88-1524

No. _____

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1988

JACK R. CREMEANS,

Petitioner,

vs.

CITY OF ROSEVILLE, a Municipal Corporation, CITY OF ROSEVILLE POLICE DEPARTMENT, THOMAS H. ASMAN, Chief of Police of the City of Roseville Police Department and member of the City of Roseville Retirement Board, ROSEVILLE POLICE OFFICERS' ASSOCIATION, a non-profit labor organization, THE CITY OF ROSEVILLE RETIREMENT BOARD, and T. VANDAMME, MARGARET SPYBROOK, L. HAGGERTY and WILLIAM POWELL, Members of the City of Roseville Retirement Board, Jointly and Severally,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. WAS THE PROCEEDING OF THE CITY OF ROSEVILLE, MICHIGAN, RETIREMENT BOARD OF TRUSTEES, WHICH WAS ARRANGED BY TWO BOARD MEMBERS TO EFFECT PERMANENT REMOVAL OF PETITIONER FROM CITY SERVICE, WAS CONDUCTED IN VIOLATION OF ESTABLISHED BOARD PROCEEDINGS, AND RESULTED IN PETITIONER'S INVOLUNTARY RETIREMENT, A SHAM SUCH AS TO DENY TO PETITIONER PROCEDURAL DUE PROCESS OF LAW?

II. DID THE SIXTH CIRCUIT COURT OF APPEALS ERR IN REVERSING THE TRIAL COURT'S DECISION DENYING RESPONDENT'S MOTION FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT?

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OPINIONS BELOW

The Opinion of the Court of Appeals (App. 1) is reported at 861 F.2d 878 (6th Cir. 1988). The Memorandum Opinion and Order of the District Court on various post-trial Motions (App. 2) is not reported. The Memorandum Opinion and Order of the District Court denying Petitioner's Equitable Claim for Reinstatement (App. 3) is not reported.

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JURISDICTION

The Opinion of the Sixth Circuit Court of Appeals on appeal from the District Court (App. 1) was decided and filed October 28, 1988. The decision of the Court of Appeals denying Petitioner's Motion for Re-Hearing *en banc* (App. 4) was entered on December 14, 1988.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

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CONSTITUTIONAL, STATUTORY, AND CHARTER PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides, in material part:

> "No state shall . . . deprive any person of life, liberty or property, without due process of law . . ."

2. 42 U.S.C. § 1983 provides, in material part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State

> or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ."

3. Michigan Compiled Laws Section 38.555, a provision of Act 29 of the Michigan Public Acts of 1937 (MCL §§ 38.551-38.562), which authorizes creation of a system of pensions and retirements for municipal fire and police departments, provides:

> "The board shall be a quasi-judicial body, and its actions shall be reviewable by writ of certiorari only."

4. Michigan Compiled Laws Section 38.514, a provision of Act 78 of the Michigan Public Acts of 1935 (MCL §§ 38.501-38.518), which authorizes creation of a board of civil service commissioners for municipal fire and police departments. (App. 5).

5. Michigan Compiled Laws Section 117.4(i)(8), a provision of Act 279 of the Michigan Public Acts of 1909 (MCL §§ 117.1 - 117.37), popularly known as the Home Rule City Act, stat

> Each city in its charter may provide:
>
> * * *
>
> "For a system of compensation for its employees and their dependents in the case of disability, injury or death of such employees."

6. Michigan General Court Rule, 1963, 711 authorizes the superintending control power of a court over lower courts or tribunals (App. 6).

7. Section 15.22 of the Charter of the City of Roseville, Michigan, is a provision of Chapter 15 of the Charter, establishing an employees' retirement system (App. 10).

8. Chapter 16 of the Charter of the City of Roseville, Michigan, states:

> "The plan of civil service, as established by Act No. 78 of the Public Acts of 1935, as amended, is hereby adopted by the city of Roseville and incorporated in this charter by reference, with the same force and effect as though fully set forth in this charter. Nothing is hereby added to or deleted from the said act by such incorporation as a part of this charter and there shall be no addition or deletion from the provisions of that act, as it was in effect on the effective date of this charter, except by amendment of this charter."

STATEMENT

Petitioner, James R. Cremeans, was employed as a patrolman by the City of Roseville on May 1, 1967. Beginning in March, 1969, Petitioner was continually in conflict with Respondent Thomas H. Asman, then Chief of Police (Asman). The long-standing animosity between the two men and the repeated, though unsuccessful, attempts by Asman to force Petitioner's separation from service are undisputed.

In November, 1978, Petitioner injured his right knee while off duty. He was treated in Ann Arbor, Michigan

by Dr. Gerald A. O'Connor, M.D., who described the injury as follows:

> "I think that in view of the arthritic changes in the knee joint, he is advised to consider changing jobs, to one that did not require him to be on his feet as much as a police officer would." (App. 11)

Dr. O'Connor did not recommend specific work restrictions, and Petitioner thereafter returned to his job as a patrol officer.

Two years later, Asman required Petitioner to submit to a physical examination at the Detroit Industrial Clinic by Dr. Norman R. Wilson, M.D. During the December 10, 1980 examination, Dr. Wilson told Petitioner that "his knees were as strong as a guard rail." Dr. Wilson recommended no work restrictions and submitted a report (App. 12) to Asman. Again, Petitioner returned to his job.

At about 3:00 p.m. on January 6, 1981, while on patrol in his vehicle, Petitioner received orders by radio to return to the station to see Asman. As Petitioner approached Asman's office, Asman stepped into the hallway, waved a piece of paper at him and yelled: "I got the doctor's report, and this is your last day."

As he left the station, Petitioner was told by Officer William Powell, the union representative, that he was being added to the agenda for the regular meeting of the Retirement Board of Trustees the next day, and that he could be present, if he wished. Petitioner received no other notice that he was to be on the agenda for the Board's January 7, 1981 meeting. Petitioner did receive a copy of the third page of Dr. Wilson's report either the day before or the day of the Retirement Board meeting.

The Retirement Board consisted of Asman, City Manager Thomas VanDamme (VanDamme), Mayor Leonard Haggerty (Haggerty), and citizen member Margaret Spybrook (Spybrook).

During the 26 hours in which he had notice of the upcoming meeting, Petitioner sought advice from two attorneys, but neither was available on such short notice. At about 5:00 p.m. on the day of the Board meeting, Petitioner asked attorney Douglas Dinning for advice, but Mr. Dinning was unable to represent him because he was counsel for the City of Roseville. The meeting was scheduled for 6:00 p.m.

While Petitioner was sitting in the lobby at City Hall prior to the Board meeting, Powell, the union representative, told Petitioner that he would be retired that night and that he would not be allowed the customary one-year medical leave, with pay. Moments later, Haggerty, then Mayor of Roseville and a member of the Retirement Board, saw Petitioner and volunteered, "Jack, I hate to see a good officer leave."

After Petitioner was called into the meeting, he stated that he had not had time to obtain legal counsel and that he had received only the third page of the medical report. Although he agreed to proceed with the meeting and expressed doubts about his ability to continue as a patrol officer, he said he did no understand what his rights were. Throughout the meeting, Petitioner expressed uncertainty about what he should do. Asman then "took it out of his hands," and moved for involuntary disability retirement of Petitioner Cremeans. The motion was supported by VanDamme and was carried. (See transcript of the Board meeting, App. 13)

At trial, Board members Spybrook and Haggerty could not recall who brought the matter before the Board. Haggerty believed Petitioner had requested retirement, and recalled that Petitioner was uncertain about what he should do.

The City Charter established conditions and procedures for effecting a medical disability retirement (App. 10). However, the Board did not adhere to the Charter requirements, to wit: (1) there was no statement or certification by the medical director that Petitioner was "mentally or physically totally incapacitated for duty in the service of the City . . ."; or (2) "that his incapacity will probably be permanent"; or (3) that Petitioner "should be retired." The only physician's statement before the Board was the uncertified, written report of Dr. Wilson, which was ambiguous as to the matter of disability, and which was not made entirely available to Petitioner.

At trial, Respondents claimed that the Board had departed from the Charter requirements on the basis of an alleged opinion letter from the City Attorney that authorized such departure. Respondents admitted that the opinion letter did not specifically address the Cremeans matter. Further, Respondents never offered the alleged opinion letter into evidence.

Respondents testified that the Board had established procedures for considering disability retirement. Accordingly, if the employer sought medical retirement, medical evidence of eligibility would be produced and the Board would order a second physical examination. Also, notice of a pending meeting of the Retirement Board would be given to the employee under consideration, and the employee's name would be added to agenda. Upon request,

an employee was granted a hearing and an opportunity to obtain legal counsel. At the hearing, the Board would consider the reports of the City's medical director and of the consulting doctors.

Not one of these procedures was followed for Petitioner's retirement; nor was Petitioner aware of them.

Asman testified that employees in Petitioner Cremeans' circumstances are usually given a one-year medical leave with full pay and benefits. Upon confirmation that the employee is recovering and can eventually return to work, an employee usually can remain on leave for a second year without benefits or pay, while receiving workers' compensation payments and keeping seniority. No such medical leave was offered to Petitioner.

Two years after Petitioner's involuntary retirement, ostensibly because of his injured knees, the City Medical Director examined Petitioner and concluded that "[h]e has rehabilitated his knees nicely and has only the residual osteoarthritis remaining with minimal symptomotology." (App. 14) The Board took no action based on the City Medical Director's report.

Petitioner brought suit in the District Court on October 27, 1982, asserting claims arising under 42 U.S.C. § 1983 and pendent state law claims for constructive discharge, wrongful discharge, intentional infliction of emotional distress, and defamation. Named as defendants were the City of Roseville; the City of Roseville Police Department; Asman; the Roseville Police Officers' Association; the City of Roseville Retirement Board; and VanDamme, Spybrook, Haggerty, and Powell, members of the City of Roseville Retirement Board.

The jointly-filed Pre-Trial Statement reiterated Petitioner's contention that "the disability retirement was, in effect, a sham."

In addition, Plaintiff's counsel, in his opening statement, declared as follows:

> ". . . the Retirement Board Hearing, meeting, if you will, was nothing more than sham, that it was an artifice, that it was a device used by Chief Asman and Mr. VanDamme, two of the defendants who were Retirement Board members, to separate him from his service as a patrolman with the City of Roseville."

During the course of the litigation, claims against Defendants Powell, the Roseville Police Officers Association, the City of Roseville, the City of Roseville Police Department and the City of Roseville Retirement Board were dismissed for various reasons. The case went to the jury only on the 42 U.S.C. § 1983 claims against the individual Board members.

The jury awarded Petitioner compensatory damages in the amount of $100,625 against VanDamme and Asman, punitive damages in the amount of $5,000 against Asman, and punitive damages in the amount of $3,000 against VanDamme. The jury found in favor of Haggerty and Spybrook. Judgment was entered on the jury verdict on August 29, 1985. On December 3, 1985, the District Court denied Petitioner's equitable claim for reinstatement.

On April 9, 1986, the District Court granted Petitioner's Motion to Amend Judgment, denied Respondent's motions for new trial and for judgment notwithstanding the verdict, and granted Petitioner attorney fees.

Respondents' Notice of Appeal was filed in the Sixth Circuit Court of Appeals on May 1, 1986, and Petitioner's Cross-Appeal was filed on May 16, 1986. On October 28, 1988, the Court of Appeals reversed the Judgment of the District Court. On December 14, 1988, the Court of Appeals denied Petitioner's Motion for Re-Hearing, *en banc*.

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REASONS FOR GRANTING THE PETITION

This Petition presents a question of first impression regarding what process is due once it is determined that a public employee is entitled to due process guarantees of the Fourteenth Amendment. The Retirement Board proceeding, held ostensibly to determine Petitioner's eligibility for disability retirement, was in fact arranged to achieve the long-sought objective of Respondent Asman—Petitioner's permanent separation from service. Thus, the proceeding was found to be a sham by a jury under 42 U.S.C. § 1983.

In reversing the judgment, the Court of Appeals relied upon inapposite cases, including *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985), which, unlike *Cremeans,* involved a pre-termination, right-of-reply hearing which was coupled with a statutory right to respond in a post-termination hearing, and *Duchesne v. Williams,* 849 F.2d 1004 (6th Cir. 1988), which was a flawed opinion, accompanied by a forceful dissent, and which is the subject of a petition for certiorari. *Cremeans v. City of Roseville,* 861 F.2d 878 (6th Cir. 1988)

Further, the Court of Appeals ignored the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and the rule stated by Justice Frankfurter in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 164 (1951) that in order to meet Constitutional requirements, a hearing "must be a real one, not a sham or pretense," (quoting *Palko v. Connecticut*, 302 U.S. 319, 327 (1937)).

In addition, *Cremeans* is in direct conflict with the decision of the Seventh Circuit in *Ceichon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982), which granted relief from a sham hearing. Finally, the Court of Appeals disregarded its decision in *Hildebrand v. Board of Trustees of Michigan State University*, 662 F.2d 439 (6th Cir. 1981), with respect to the standard to be applied in granting motions for directed verdict and for judgment notwithstanding the verdict.

I. The Retirement Board Proceedings Were a Sham, Arranged Solely for the Purpose of Separating Petitioner Cremeans From Service as a Patrolman With the City of Roseville, and Were Therefore a Denial of Procedural Due Process.

The Retirement Board proceedings on January 7, 1981 were simply the last of a series of previously unsuccessful attempts by Asman to remove Petitioner from his job as a patrolman with the City of Roseville.

The agenda was set by Asman, with the cooperation of VanDamme, City Manager and Board member, when the opportunity for yet another assault on Petitioner's status presented itself in the form of an inconclusive

report by the City's medical director regarding Petitioner's knee injury. (App. 12) Asman had required Cremeans to be examined by the medical director for the City and, upon obtaining the doctor's report of the examination on January 6, 1981, Asman called Petitioner in from his patrol to the City offices and announced, "I got the doctor's report, and this is your last day."

Further evidence of the sham nature of the proceedings includes the following: (1) Asman added Petitioner to the agenda of the Retirement Board meeting immediately after Asman got the doctor's report and after the formal agenda had been prepared; (2) Petitioner received oral notice of the Board proceedings, his first and only notice, approximately 26 hours before the meeting was to begin; (3) Petitioner tried but was unable to obtain counsel on such short notice; (4) The union representative, Powell, told Petitioner just a few hours before the Retirement Board meeting that he would be retired that night and that he would not be allowed the customary one-year medical leave for rehabilitation; (5) Haggerty, a Board member, was unaware of the contrived nature of the proceedings and believed that Petitioner had requested retirement; (6) Spybrook, also a Board member, believed that Cremeans might have brought the matter before the Board, but she, too, was unaware of the concealed motives of Asman and VanDamme; (7) The Retirement Board did not follow City Charter requirements governing the award of a disability retirement (App. 10); and (8) Petitioner was not advised of the procedures established by the Board for considering contested retirement petitions, which were not followed in this case.

Despite the foregoing, the Court of Appeals did not view the proceedings as a sham or artifice. The Court assumed that the meeting of the Retirement Board was a pre-termination, right-of-reply type hearing, and erroneously concluded that post-termination remedies were available to Petitioner if he had only pursued them. *Cremeans*, 861 F.2d at 882 (1988). To some extent, the Court adopted the analysis found in *Loudermill* and *Duchesne*. *Id.* at 882-883.

In *Duchesne*, 849 F.2d at 1005, the Court considered the adequacy of a pre-termination hearing, stating the issue as follows:

> "Does *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 14 L.Ed.2d 494 (1985), aff'g, 721 F.2d 550 (6th Cir. 1983), require that a discharged municipal employee receive a pre-termination hearing before a neutral and impartial decision-maker, rather than before the supervisor who fired him?"

The Court of Appeals in *Duchesne*, relying upon *Loudermill*, held that due process does not necessarily require a pre-termination hearing before a neutral decision-maker. *Id.* at 1008. In *Loudermill*, the Court set forth the procedures required by the Constitution for a pre-termination hearing where a post-termination hearing is also available. 470 U.S. at 545-46.

In the instant case, the Court of Appeals assumed that Petitioner had a post-retirement opportunity for review of the Board's decision by writ of certiorari. 861 F.2d at 881. Certiorari has been superseded by the Order of Superintending Control in Michigan. (GCR 1963, 711;

App. 6) The Court cited a statute which creates retirement boards for municipalities (MCL § 38.555) but which does not apply to the Board here. *Id.* at 881, n. 4. (App. 1) The Retirement Board in this case was authorized by Chapter 15 of the Roseville City Charter. (App. 10; *See also* MCL § 117.4(i)(8), *supra*). The Roseville City Charter does not provide for review of Retirement Board decisions. Thus, neither the City Charter nor MCL § 38.514 made a "post-termination" hearing available to Petitioner.

The Court also assumed that Petitioner had post-deprivation remedies available to him pursuant to the statute which permits a municipality to create a police and fire civil service commission, known locally as the "Act 78 Board," and which allows direct appeals of Civil Service Commission decisions. (MCL § 38.501 *et seq.*) *Id.* at 881. The City of Roseville did, in fact, have a police and civil service commission, pursuant to Act 78. (App. 5). However, Act 78 creates a right to a hearing in cases of removal or suspension, not retirement, and the statute requires a pre-termination, plenary, trial-type hearing (MCL § 38.514; App. 5). The Retirement Board did not provide this type of hearing for involuntary retirement proceedings. Moreover, the Civil Service Commission does not have jurisdiction to overturn decisions of the Retirement Board.

If Petitioner had a state law remedy, it was by complaint for supertintending control, GCR 1963, 711. (App. 6) Superintending control supersedes the writ of certiorari, and Michigan has adopted the rule " . . . that the traditional limits on the scope of review under the writs will be observed under the new order." *Lepofsky v. Lincoln*

Park, 48 Mich. App. 347, 356 (1973). The scope of inquiry under the writ is "to bring before the superior tribunal the record of the proceedings below in order that the superior court may determine from the face of the record whether the inferior tribunal has exceeded its jurisdiction, or has made errors in the law." *Id.* at 356.

The record of the Retirement Board proceedings in this case does not reflect the error of which Petitioner complains. (App. 13) The facts demonstrating that the hearing was a sham are not in the record. A proper record is a result of adequate representation, and the union representative, Powell, was neither equipped nor inclined to furnish what was necessary to establish such a record. Thus, the remedy of superintending control is wholly inadequate to afford relief under the circumstances of this case. Further, a certiorari-type review is not the "post-termination" review contemplated by *Loudermill*, 470 U.S. at 547.

Nevertheless, the Court of Appeals concluded that the hearing was not a sham. 861 F.2d at 883. First, the Court found that the hearing met the due process requirements of *Loudermill* and *Duchesne* as a "right-of-reply pre-termination hearing." *Id.* Second, the Court suggested that Petitioner did not resist with sufficient vigor the efforts of Asman and VanDamme to effect his retirement, and ultimately his permanent separation. *Id.* at 884. Apparently, based on the Court's reasoning, Petitioner's unwitting participation in the charade put on by Asman and VanDamme in effect operated as a waiver of his Constitutional due process rights.

II. The Decision in the Instant Case is in Conflict With a Decision of the Seventh Circuit Court of Appeals.

In *Ceichon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982), a permanent career service paramedic with the Chicago Fire Department was discharged in an attempt to deflect charges by angry citizens who felt aggrieved by the death of a neighbor, which occurred as a result of the alleged negligence of the employee. Finding that the termination violated the employee's due process rights, the court reasoned as follows:

> "Even if the procedures themselves are legitimate, it is impermissible to employ those procedures vindictively or maliciously so as to deny a particular individual due process." *Blackledge v. Perry*, 417 U.S. 21, 25-28, 94 S.Ct. 2098, 2101-2102, 40 L.Ed.2d 628; *North Carolina v. Pearce*, 395 U.S. 711, 723-26, 89 S.Ct. 2072, 2079-81, 23 L.Ed.2d 656.

Continuing, the Court stated:

> "Due process also was violated by the City's unfortunate reaction to the Ciebien family's threat of adverse publicity, which infused the disciplinary procedures with a deliberate, illegitimate bias. Due process requires that a hearing 'must be a real one, not a sham or a pretense.'" *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 164, 71 S.Ct. 624, 644, 95 L.Ed. 817 (Frankfurter, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 310, 327, 58 S.Ct. 149, 152, 82 L.Ed. 288)). 686 F.2d at 517.

Other than *Ceichon*, very few federal appellate courts have thoroughly considered the sham nature of proceedings. *See* Redish and Marshall, *Adjudicatory Independence and the Values of Due Process*, 95 Yale L.J. 455,

456 (1986) and Friendly, *"Some Kind of Hearing,"* 123 U.Penn.L.Rev. 1268 (1975).

In *Lee v. Hudson,* 810 F.2d 1030 (11th Cir. 1987), a tenured employee of the Cobb County, Georgia, Sheriff's Department brought procedural and substantive due process claims against the sheriff and county arising out of the termination of her employment by the county civil service board. The procedural claim included assertions that the board hearing was nothing more than a sham. The Court of Appeals upheld the District Court's decision that the existence of adequate state law remedies from the board's decision defeated her procedurai due process claims. *Id.* at 1031.

Based on the foregoing, the Courts of Appeal follow at least three distinct approaches in dealing with allegations of sham proceedings: The Seventh Circuit recognizes the sham claim as cognizable under Section 1983 (*Ceichon, supra*); the Sixth Circuit finds sham claims cognizable under Section 1983, but applies a very loose standard of procedural due process (*Duchesne, supra*); and the Eleventh Circuit will refuse to hear sham-type claims if adequate state law remedies are available (*Lee, supra*). *See also,* two federal district court decisions holding that sham proceedings violated due process: *Bhargave v. Coer,* 355 F. Supp. 1143 (N.D. Ga. 1972), where a school board met and decided to terminate a contract teacher's employment six days before her formal hearing; and *Salisbury v. Housing Authority of City of Newport,* 615 F. Supp. 1433 (D.C. Ky. 1985), where impartiality on the part of the tribunal was held to be of such magnitude that even a full dress hearing denied due process.

III. The Decision in the Instant Case is in Conflict With Decisions of the United States Supreme Court.

The Supreme Court has held that sham proceedings deny due process. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. at 164 (Frankfurter, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). However, it remains unclear what process is due once it it determined that due process guarantees apply and which test is applicable for determining whether a particular proceeding is actually a sham. (*See* Redish and Marshall, 95 Yale L.J. at 455, 456.)

The balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), as applied by the Supreme Court in *Loudermill*, is the appropriate test in this case. *Loudermill*, 470 U.S. at 545. However, the Court of Appeals, which presumably relied upon *Loudermill*, did not apply the balancing test in determining the propriety of the procedures followed.

That the Retirement Board proceeding was a sham is made clear under the *Mathews* test, which states:

> "First the private interest that would be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens as additional or substitute procedural requirement would entail." *Id.*, 424 U.S. 319, 335.

With respect to the first element of the *Mathews* test, the private interest affected herein is Petitioner's interest

in employment, one which is created and protected by the Police and Firemen's Civil Service Act previously discussed. (See MCL §§ 38.501 *et seq.*, 38.514; App. 5) He has a legitimate claim of entitlement to this employment. His interest stems from an independent source of state law. Thus, his employment interest meets the standards for defining a property interest entitled to constitutional protection as set forth in *Board of Regents v. Roth*, 408 U.S. 564 (1972).

With respect to the second element of the *Mathews* test, the risk of erroneous deprivation is high in this case. Petitioner was retired in violation of City Charter requirements. That error is manifest. More stringent procedural requirements would have assured adherence to the law. In addition, the probable value of additional or substitute procedural safeguards is demonstrable because a fair result would have been achieved if Petitioner had had legal counsel and if the Board had been unbiased.

Finally, the government has a substantial interest in assuring that its employees are not retired prematurely. First, the City cannot afford to lose a well-qualified patrolman. The exit evaluation, in which Asman concurred, established Petitioner's competency. Second, there is a financial consequence to the retirement fund and to the City, based on the shift in status by Petitioner from full-time employee to retired employee. VanDamme testified that if Petitioner were not retired, the retirement fund would have saved money to the extent that payments were not made to him. And, with Petitioner working as a full-time employee, the City receives services in exchange for the salary paid.

Third, there would have been no increase in the fiscal and administrative burden of the Retirement Board if it had been required to follow established procedures and City Charter requirements. The City could only benefit from preventing Asman and VanDamme from wrongfully separating Petitioner from service.

IV. The Court of Appeals Erred in Reversing the Decision of the Trial Court Denying Respondent's Motion for Directed Verdict and Judgment Notwithstanding the Verdict.

The standard for granting a directed verdict or judgment notwithstanding the verdict (J.N.O.V.) was announced in *Hildebrand v. Board of Trustees of Michigan State University*, 662 F.2d 439 (6th Cir. 1981), as follows:

> "(5) The standard for granting J.N.O.V. is well established. All evidence and inferences therefrom must be read in favor of the party opposing the J.N.O.V. A court cannot weight the evidence. Only if there is but one reasonable conclusion as to the proper verdict can J.N.O.V. be granted. (Citations omitted.)"

There was ample evidence submitted regarding the sham nature of the proceedings, which the jury believed. The Court of Appeals chose to ignore that evidence and to apply rules derived from *Loudermill* and *Duchesne*, cases which do specifically address sham proceedings under circumstances similar to this case.

The jury verdict should have been allowed to stand, and the trial court was correct in denying Respondents' motions for directed verdict and judgment N.O.V.

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PRAYER

Petitioner respectfully suggests that the questions presented by this case are such that the Court should issue certiorari to the Sixth Circuit Court of Appeals.

Respectfully submitted,

CARL F. SCHIER (P 19976)
SCHIER, DENEWETH & PARFITT, P.C.
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Attorney for Petitioner

Dated: March 14, 1989

APPENDIX 1

RECOMMENDED FOR FULL TEXT PUBLICATION

See, Sixth Circuit Rule 24

Nos. 86-1401/1446

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACK R. CREMEANS, Plaintiff-Appellee, Cross-Appellant, v. CITY OF ROSEVILLE, a Municipal Corporation, CITY OF ROSEVILLE POLICE DEPARTMENT, THOMAS H. ASMAN, Chief of Police Department and member of the City of Roseville Retirement Board, ROSEVILLE POLICE OFFICER'S ASSOCIATION, a non-profit labor organization, THE CITY OF ROSEVILLE RETIREMENT BOARD, and T. VANDAMME, MARGARET SPYBROOK, L. HAGGERTY and WILLIAM POWELL, Members of the City of Roseville Retirement Board, Jointly and Severally, Defendants-Appellants, Cross-Appellees.	)	On Appeal from the United States District Court for the Eastern District of Michigan.

Decided and Filed October 28, 1988

Before: ENGEL, Chief Judge;* LIVELY** and KRUPANSKY, Circuit Judges.

ENGEL, Chief Judge. This action is before us on cross-appeals by the plaintiff Jack R. Cremeans and by defendants Thomas H. Asman and Thomas VanDamme. Cremeans claims that the trial court erred in refusing to reinstate him to his position as a patrolman following a favorable jury verdict on his 42 U.S.C. § 1983 claim. Asman and VanDamme allege that as a matter of law plaintiff failed to present sufficient evidence to create a jury question that plaintiff's right to procedural due process was violated. Asman and VanDamme do not argue on appeal that they were entitled to qualified immunity. They have not challenged the damages awarded as excessive, nor have they challenged the trial court's instructions to the jury on the applicable law. Because we find that as a matter of law there was no due process violation, we need not address the reinstatement issue.

FACTS

This case is based upon Cremeans' claim that he was denied procedural due process when he was placed on involuntary medical disability retirement from the City of Roseville Police Force. On May 1, 1967, Cremeans be-

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*The Honorable Albert J. Engel assumed the duties of Chief Judge effective April 1, 1988.

**The Honorable Pierce Lively stepped down from the Chief Judge's position on April 1, 1988 and remains an active Circuit Judge.

gan work as a patrolman with the City of Roseville. Cremeans suffered a knee injury when he slipped and fell in a non-work related incident in October of 1978.[1] As a result of that injury he missed approximately three months of work. Cremeans' knee problems continued. In 1980 he missed fifteen or sixteen days following arthroscopic surgery on his knee. When plaintiff sought to return to work, Chief of Police Asman required him to file a doctor's statement indicating that he was fit to return. Cremeans gave Asman a letter sent by a Dr. O'Connell evaluating Cremeans' condition. Dr. O'Connell's letter stated, "[I]n view of the arthritic changes in the knee joint, he [plaintiff] is advised to consider changing jobs, to one that d[oes] not require him to be on his feet as much as a police officer would."

Police Chief Asman then petitioned the Retirement Board to consider a medical disability retirement. A letter dated December 2, 1980 from the city clerk informed plaintiff that Asman had requested that his disability retirement be placed on the Retirement Board's agenda. The letter further informed plaintiff what section of the City Charter the request was based upon and informed plaintiff that he was scheduled to undergo a physical examination by a Dr. Wilson on December 10, 1980. Dr. Wilson's medical report concluded by stating, "I would have serious doubts as to Mr. Cremeans' physical ability to continue to perform as a patrolman."

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[1]Cremeans had a history of knee injuries, including high school football injuries and a knee injury which resulted in his receiving a medical discharge from the Air Force in 1959.

On January 7, 1981, the Retirement Board considered Cremeans' case. Cremeans had had approximately 24-26 hours notice before this hearing. When he appeared at the hearing Cremeans was invited to make a statement. Cremeans pointed out that he had only brief notice of the hearing and that he had not had the opportunity to employ an attorney. The Board offered to table the decision and give Cremeans additional time to prepare. Cremeans declined this offer, stating that he had "serious doubts as to whether he could continue to perform the duties of a patrolman," and would leave the matter in the Board's hands. The Board voted unanimously to grant plaintiff disability retirement and advised Cremeans that if his physical condition improved he could petition for reinstatement.

In May of 1981, Cremeans was hospitalized for a heart attack. Cremeans never sought reinstatement to the Roseville Police Department until filing this lawsuit. Further, during the course of this suit he has changed his mind several times as to whether he wants to be reinstated as a patrolman for the City of Roseville.

PROCEDURAL HISTORY

On October 27, 1982, Cremeans filed a five-count complaint in the United States District Court for the Eastern District of Michigan. Only two of these counts went to the jury.[2] Plaintiff's 42 U.S.C. § 1983 claim went to the

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[2]The five counts in the complaint were as follows: count I alleged that the City of Roseville (Roseville), the Roseville Police

(Continued on following page)

jury only against the individual Board members: Asman, VanDamme, Spybrook and Haggerty. The state law claim for intentional infliction of emotional distress went to the jury only as to defendants Asman and the City of Roseville.

(Continued from previous page)

Department (Police Department), the City of Roseville Retirement Board (Board), Thomas Asman (Asman, both as Police Chief and Board member) and the other members of the Board, including Thomas VanDamme, Margaret Spybrook, Larry Haggerty, and William Powell violated plaintiff's right to procedural due process in violation of 42 U.S.C. § 1983; count II alleged wrongful discharge by Roseville, the Police Department, the Board and Chief of Police Asman; count III alleged defamation by Roseville, its Police Department and Asman; count IV alleged intentional infliction of emotional distress by all defendants; and count V alleged a failure to represent by the City of Roseville's Police Officers' Association (Association).

On July 24, 1984 count III was dismissed by stipulation of the parties. On July 25, 1984 the trial judge granted defendants' motions for summary judgment as to counts I and II. The judge also granted defendants' motion for partial summary judgment as to count IV to all defendants except the Association. Therefore, as of July 25, 1984 only counts IV and V of the original complaint remained against the Association. On August 3, 1984, plaintiff voluntarily dismissed its claims against the defendant Association and defendant William Powell.

On June 20, 1985, the trial judge granted plaintiff's motion for relief from the entry of summary judgment, and upon reconsideration, denied the defendants' motion for partial summary judgment. Plaintiff withdrew his claim for intentional infliction of emotional distress against defendants Spybrook and Haggerty on August 20, 1985. The court also dismissed the intentional infliction of emotional distress claim against Van Damme on the same day. Counsel stipulated for the record on August 28, 1985 that the Board and the Police Department were all part of the municipal corporation of the City of Roseville. Further, on the 28th, the trial court granted Roseville's motion for a directed verdict on the section 1983 claim. The court, however, denied the motion for directed verdict by the individual Board members.

The case went to the jury by special verdict. Fed. R. Civ. P. 49. The jury found that defendants Asman and VanDamme violated the plaintiff's constitutional right to procedural due process. The jury awarded plaintiff $100,625 in compensatory damages and punitive damages in amounts of $5,000 and $3,000 against Asman and VanDamme respectively. The jury found no cause of action against either Asman or the City of Roseville on the state law claim of intentional infliction of emotional distress.

The trial judge considered plaintiff's request for the equitable relief of reinstatement on the § 1983 claim separately. The court denied plaintiff's request for reinstatement finding that plaintiff was medically incapable of resuming his job as a police officer and that there remained neither a party defendant nor a nonparty privy capable of providing the injunctive relief requested by plaintiff. The parties thereafter filed cross-appeals.

PROCEDURAL DUE PROCESS

Defendants argue that Cremeans failed to provide sufficient evidence to create a jury question that plaintiff's right to procedural due process had been violated. Defendants have protected their right to make the argument by moving for a directed verdict at the close of plaintiff's proof and by making a motion for a judgment N.O.V. or a new trial within 10 days of the entry of judgment. Fed. R. Civ. P. 59.

Plaintiff's complaint alleges that the procedure used in placing him on non-duty disability retirement was an unconstitutional violation of the due process clause of the fourteenth amendment. Plaintiff's "federal constitutional

claim depends on [his] having had a property right in continued employment." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538 (1985). "Property interests are not created by the Constitution; 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . .' (citation omitted)." *Loudermill*, 470 U.S. at 538. Cremeans' complaint relied upon Mich. Comp. Laws Ann. §§ 38.501-38.518 for that property right. The defendants admitted that the City of Roseville adopted and incorporated by reference the code sections described above but deny that they applied in this case. The sections described above set up local civil service commissions for cities, villages and municipalities having a fire and/or police department. Section 38.514 states in pertinent part "No member of any fire or police department within the terms of this act shall be removed, discharged, reduced in rank or pay, suspended or otherwise punished except for cause." Mich. Comp. Laws Ann. § 38.514 (1985).[3]

The problem before us is that the actions complained of were taken by the "Roseville Retirement Board [at a] regular meeting, Wednesday, January 7, 1981" and not by a Civil Service Commission. The Michigan code sections outlining the authority of retirement boards are found in Mich. Comp. Laws Ann. §§ 38.551-38.572. Section 38.556 (2)(e) states that "[u]pon the application of a member, or

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[3]In 1986 this section was amended. It now states "[A] member of any fire or police department *encompassed by* this act shall *not* be removed, discharged, reduced in rank or pay, suspended, or otherwise punished except for cause. . . ." Mich. Comp. Laws Ann. § 38.514 (Supp. 1988).

his department head, a member in service who has 5 or more years of service credit and who becomes totally and permanently incapacitated for duty by reason of a personal injury or disease occurring as the result of causes arising outside the course of his employment by the city, village, or municipality *may be retired by the retirement board.*'' *Id.* (emphasis added). The Michigan Supreme Court has clearly rejected appellant's apparent argument that retirement constitutes removal under the act establishing local civil service commissioners.

> [C]learly the legislature when it enacted Act 345 [P.A. 1937, No. 345 authorizing local retirement boards, codified at Mich. Comp. Laws Ann. §§ 38.551-38.572] knew of the existence of Act 78 of 1935 [P.A. 1935, No. 78 authorizing local civil service commissions, codified at Mich. Comp. Laws Ann. §§ 38.501-38.518], and the two must be read together. *This being so, it is obvious to the court that the legislature intended Act 78 not to cover retirement but merely to cover performance of duty, misfeasance, malfeasance, nonfeasance and so forth, but not to cover retirement because the legislature after adopting Act 78 provided for the establishment of a retirement system under Act 345.*

Molinaro v. Driver, 364 Mich. 341, 111 N.W.2d 50, 55 (1961) (emphasis added).

The parties have not cited any authority nor have we uncovered any case law determining whether Mich. Comp. Laws Ann. § 38.556(2)(e) creates a property interest in continued employment. As was the case in our recent decision in *Duchesne v. Williams*, 849 F.2d 1004, 1006 (6th Cir. 1988) (en banc), we need not resolve this complicated state law issue because as a matter of constitutional law Cremeans failed to state a due process violation.

Cremeans made no constitutional challenge to the statute under which he was discharged. He also failed to contest the Retirement Board's decision under the procedures provided by statute.[4] Therefore, the only question before us is whether the procedure used in discharging the plaintiff was constitutionally adequate. The Supreme Court recently addressed the issue of due process in a pretermination hearing in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* at 533 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

> An essential principle of due process is that a deprivation of life, liberty or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). We have described the "root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis in original); *see Bell v. Burson*, 402 U.S. 535, 542 (1971). This principle requires "some kind of hearing" prior to the discharge of an employee who has a constitutionally

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[4]Mich. Comp. Laws Ann. § 38.555 states "The [retirement] board shall be a quasi-judicial body, and its actions shall be reviewable by writ of certiorari only." Mich. Comp. Laws Ann. § 38.514 provides for direct appeal of a civil service commission's decision to the circuit court of the county wherein the city, village or municipality is situated. Such an appeal must be taken within 90 days from the entry of the civil service commission's final order. *Id.* Cremeans did not attempt to challenge the Retirement Board's decision through either method described above.

> protected property interest in his employment. *Board of Regents v. Roth*, 408 U.S., at 569-70; *Perry v. Sindermann*, 408 U.S. 593, 599 (1972).

Loudermill, 470 U.S. at 542.

The Court also noted that a pretermination hearing, though necessary, need not be elaborate.

> "[T]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie v. Connecticut*, 401 U.S. at 378. See *Cafeteria Workers v. McElroy*, 367 U.S. 886, 894-895 (1961). In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action. *Mathews v. Eldridge*, 424 U.S., at 343.

Loudermill, 470 U.S. at 545.

> "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests affected. . . . [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors. First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Eldridge, 424 U.S. at 335.

The theory upon which Cremeans' section 1983 complaint was submitted to the jury was that the individual board members deprived him of his constitutional right to due process. We are not concerned with determining whether the procedure involved strictly complied with state law. There was a state law remedy for such a violation which Cremeans chose to forego. A state is allowed to provide more elaborate protection of employees' rights than is provided by the federal law and the Constitution. What we are concerned with here is the question of whether Cremeans received constitutionally adequate process when he was placed on involuntary non-duty medical disability retirement. For the reasons which follow we conclude that as a matter of law Cremeans received constitutionally adequate process and erred in the trial court submitting this case to the jury.

In this case, a large portion of the plaintiff's claim was the history of animosity between himself and Asman. Viewing the evidence in the light most favorable to Cremeans, the prevailing party, the following incidents evidenced Asman's animosity towards Cremeans.

(1) In March of 1969 Cremeans and a Sergeant Murphy made a DUIL arrest of a Mr. Pierce. Apparently while plaintiff was preparing an arrest report Pierce was released by another officer. Thereafter, Asman, Cremeans and Murphy agreed that they would tear up Pierce's booking slip and that another officer would erase the breath test record. Cremeans' arrest report apparently got into the hands of department superiors who investigated the incident and the matter was resolved internally.

(2) In 1977 there was a trial board hearing over which Asman presided which ultimately determined that Cremeans should be discharged for shooting at a fleeing crime suspect. Cremeans was subsequently reinstated when it was determined that the charges had not been brought in a timely manner.

(3) A few weeks after Cremeans was reinstated, he was charged by Asman for leaving the police building contrary to Asman's direct order. An agreement was worked out between the City Attorney, Chief Asman, Cremeans and his attorney that if Cremeans passed an independent psychiatric evaluation, the charges by Chief Asman would be dropped. Cremeans passed the psychiatric examination and the charges were dropped.

(4) In June of 1978, the department received a death threat against Cremeans. Cremeans was ordered to leave town, was not told when to return, but was given a special telephone number to call if he had any questions. Cremeans was out of town from seven to nine days, spent a day or two at home, then returned to work. Cremeans was paid for his time but was unsuccessful in his demand for reimbursement for his lodging expenses. Plaintiff alleged that Asman dominated the Board and that the Board's action was nothing more than a sham.

In this case Asman was a member of a four person retirement board.[5] In our recent en banc decision in *Duchesne v. Williams*, 849 F.2d 1004 (6th Cir. 1988), we considered whether *Loudermill* required that the pretermi-

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[5]The Board normally consisted of five persons but one member was absent from the January 7, 1981 meeting.

nation hearing for a municipal employee be before a *neutral and impartial decisionmaker* rather than before the supervisor who fired him. The en banc court held that "a right of reply before the official responsible for the discharge is the entitlement contemplated in *Loudermill*." *Duchesne*, 849 F.2d at 1005. The court focused on the limited purpose of the pretermination hearing. "'It should be an initial check against mistaken decisions—essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.'" *Id.* at 1007 (quoting *Loudermill*, 470 U.S. at 545-46). "The Court narrowed the essential ingredients of this pretermination hearing to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Duchesne*, 849 F.2d at 1007. The Court also looked to the municipal employer's interest, emphasizing that "[t]o require more than this *prior to termination* would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.* at 1007 (quoting *Loudermill*, 470 U.S. at 546).

While Asman and Cremeans clearly had their differences, in light of the hearing transcript and our decision in *Duchesne*, it cannot be said that the hearing itself was nothing more than a sham such that the pretermination hearing did not fulfill its function. Plaintiff had approximately 26 hours notice that the Retirement Board was going to consider his case. When plaintiff expressed doubts as to what his legal rights were, the Board offered to table the matter and allow plaintiff additional time to

prepare. Plaintiff did not request that the matter be tabled, but instead "dumped" the decision back into the Board's hands. Finally, Cremeans repeatedly expressed doubts as to his ability to continue working as a patrolman before the Board.

Haggerty: Well Jack right now do you think that you could still perform and you want to remain then as a police officer.

Cremeans: There . . . there's doubts in my mind.

Haggerty: Oh there is doubts, you're not sure yet if you want to . . .

Cremeans: . . . I'll be very honest with you. The knee is bad. From what the doctors opinions I've talked and I've seen four to five specialists. *It's not gonna get any better* even with my therapy program I'm involved in and there's doubts as to my main concern is I really honestly feel like maybe I might jeopardize my own physical being more so or I might be out there and jeopardize another officer or a citizen.

* * *

Asman: Do you have anything else to say Jack?

Cremeans: Like I stated before, Mayor Haggerty you asked me if I'm requesting this disability. It's a heck of a decision.

Haggerty: Yeah I know. I imagine it is.

Cremeans: I could not give Chief Asman a decision. I could not even give Officer Powell here a decision cause I really don't know. The only thing I can state and in all honesty is that I do have my doubts as to the circumstances

I entail that maybe if circumstances arise I might not be able to perform my job. But more so I could do more injuries to myself or to someone else, another officer or even a citizen. This is the discussion I had with my doctor in Ann Arbor and like I stated his letter states that I should consider changing. The doctor letter I understand from Doctor Wilson I believe it is, is like most doctors I'd leave room of doubt. There's words in there probable and *he had serious doubts.* I guess really what it is is that I don't know what I want to do. The chief took it outta my hands, I'm gonna dump it back in your hands. But if, bein' honest with ya, this is the way I feel. (Emphasis added).

As demonstrated by the foregoing excerpt, the plaintiff clearly had notice as to why he was being considered for medical retirement, clearly knew about the medical evidence the Board was relying upon, and was given the opportunity to present his side of the story. Rather than present his side of the story, plaintiff did nothing more than express his doubts about his ability to continue and in his own phraseology, "dumped" the decision back in the Board's hands. Under these circumstances, all concerns expressed by the Court in *Loudermill* were met. The district court tried this case shortly after the Court's decision in *Loudermill* was announced and well before our decision in *Duchesne.* In light of these cases, it was error for the trial court to have submitted the section 1983 claim to the jury. Accordingly, we REVERSE and REMAND for dismissal of the action on the merits.

APPENDIX 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JACK R. CREMEANS,

Plaintiff,

vs. CIVIL ACTION
NO. 82-30096

CITY OF ROSEVILLE,
et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

At a session of said Court held in the Federal Building, Port Huron, Michigan on the 9th day of April, 1986.

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

This is a 42 U.S.C. § 1983 case, having been previously decided in plaintiff's favor by a jury on August 29, 1985. The case is before the Court on the following motions:

1. Plaintiff's motion to amend judgment;

2. Defendants' motion for a new trial;

3. Defendants' motion for judgment notwithstanding the verdict;

4. Plaintiff's motion for attorney fees.

The Court will address these motions in the order listed.

Regarding plaintiff's motion to amend judgment the Court observes that the Clerk of the Court has previously entered judgment in this case twice. The first entry of judgment, dated August 19, 1985 reflects the jury award of damages against defendants for plaintiff's Section 1983 Due Process claims.[1] The second entry of judgment by the Clerk, dated December 3, 1985 reflects the Court's disposition of plaintiff's residual equitable claim for reinstatement by memorandum opinion and order of that same date. Therefore, for the sake of clarity and finality, the judgment entered December 3, 1985 is hereby amended to reflect the prior jury award of damages.

Accordingly, it is hereby ORDERED AND ADJUDGED that plaintiff recover from defendants Thomas Asman and Thomas Van Damm One Hundred Thousand, Six Hundred Twenty-five Dollars ($100,625.00) in compensatory damages. It is also ORDERED AND ADJUDGED that plaintiff recover Five Thousand Dollars ($5,000.00) in punitive damages from Thomas Asman and Three Thousand Dollars ($3,000.00) in punitive damages from Thomas Van Damm. It is further ORDERED AND ADJUDGED that plaintiff's request for reinstatement is DENIED.[2]

The Clerk of the Court is hereby DIRECTED to enter an amended judgment consistent herewith.

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[1]It is clear to the Court that this first "judgment" has the legal effect of an interlocutory decree, not having been certified by the Court as final pursuant to Rule 54(b).

[2]Interest on plaintiff's award shall be calculated in accordance with 28 U.S.C. § 1961 as of December 3, 1985, the date

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The Court now turns to defendants' motion for new trial. Having carefully considered defendants' various assignments of error, the Court finds no palpable defect in the trial of this case and, therefore, no legitimate basis for Rule 59 relief. Accordingly, defendants' motion for new trial is hereby DENIED.

Similarly, the Court believes that defendants have stated no basis for judgment notwithstanding the verdict. Judgment notwithstanding the verdict (JNOV) is proper only if the evidence is such that there can be but one reasonable conclusion as to the proper verdict. *Pike v. Benchmaster Manufacturing Co.*, 696 F.2d 38, 40 (6th Cir. 1982); *Greer v. United States*, 408 F.2d 631 (6th Cir. 1969). If there is sufficient evidence which would permit a reasonable jury to find for plaintiff, then a motion for JNOV should not be granted. In determining whether the evidence is sufficient, the Court cannot weigh the evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury. *Pike, supra*, at 40. The Court must view the evidence in the light most favor-

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of the original entry of judgment. The Court finds December 3 to be appropriate since plaintiff's claims were fully disposed of as of this date. This being the case, it would be unfair to delay the accrual of interest until the date of entry of the instant amended judgment since the precipitating cause thereof was merely the Court Clerk's inadvertent entry of bifurcated judgments. At the same time, the date submitted by plaintiff as controlling for interest accrual—August 29, 1985—is inappropriate since the "judgment" entered thereon was clearly interlocutory.

For purposes of 28 U.S.C. § 1961, the Court finds that the Treasury Department's post-judgment interest rate (as of December 3, 1985) is 7.87%.

able to the party against whom the JNOV motion is made, while also giving the opposing party the advantage of every reasonable inference in that party's favor. *Id.; National Polymer Products v. Borg-Warner Corporation,* 660 F.2d 171 (6th Cir. 1981). An inference is reasonable where the evidence makes the existence of a fact more probable than its nonexistence. 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2528, at 565 (1971).

In the instant case, the Court finds that sufficient evidence was presented to sustain a finding that plaintiff's constitutional right to Due Process was violated. Accordingly, defendants' motion for JNOV is hereby DENIED.

Turning at last to plaintiff's motion for attorney fees, the Court finds an award of fees appropriate under 42 U.S.C. § 1988. Section 1988 provides that in federal civil rights actions "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Since it is clear that plaintiff is a prevailing party, the Court need only determine whether the requested attorney fees are reasonable.

The leading case in this circuit for calculation of attorney fees is *Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980). *Northcross* enunciates a basic formula for fee calculation; the Court is required to multiply the number of hours of service by a reasonable hourly rate. This establishes a base attorney's fee. Once the base fee has been set, the Court may then consider the intangibles or special circumstances which justify apply-

ing either a reduction factor or contingency element. Additionally, any out-of-pocket expenses for such items as photocopying, paralegal expenses, or travel and telephone costs, are also recoverable. *Id.* at 636-40. Finally, in awarding post judgment attorney fees, the Court must consider the degree of success achieved in the case. *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Upon consideration of this matter, the Court believes that the hourly fee rates claim by Schier, Denewith and Parfitt are reasonable. At the same time, however, the Court believes that the total amount claimed should be reduced by 20% to account for the unsuccessful claims pursued by plaintiff, as well as the dismissal of several named defendants. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The Court further finds the expert witness fee claimed by plaintiff to be nonrecoverable. Accordingly, the firm of Schier, Denewith & Parfitt is hereby awarded a reasonable attorney's fee in the amount of $40,199.53.

IT IS SO ORDERED.

/s/ James Harvey
JAMES HARVEY
United States District Judge

APPENDIX 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JACK R. CREMEANS,

Plaintiff,

vs.

CIVIL ACTION
NO. 82-30096 PH

THOMAS H. ASMAN, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

At a session of said Court held in the Federal Building, Port Huron, Michigan on the 3rd day of December, 1985.

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

Plaintiff brought this action for unlawful termination of employment pursuant to 42 U.S.C. § 1983. Plaintiff claims that on January 7, 1981, he was terminated from his position as a police officer with the City of Roseville without regard to his constitutional right to due process of law. Plaintiff seeks both legal and equitable relief, including damages, and reinstatement to the Roseville Police Department.

The case was tried before a jury on August 29, 1985, and the jury returned a verdict in favor of the plaintiff. The jury determined that plaintiff was entitled to One Hundred Thousand, Six Hundred Twenty-five Dollars

($100,625.00) in compensatory damages from defendants Thomas Asman and Thomas Van Damm. The jury further awarded Five Thousand Dollars ($5,000.00) in punitive damages against defendant Asman and Three Thousand Dollars ($3,000.00) in punitive damages against defendant Van Damm.

The matter is presently before the Court on the question of what additional equitable relief is warranted under the circumstances. Upon review of the entire record and the briefs submitted by counsel, the Court hereby sets forth its Findings of Fact and Conclusions of Law pursuant to F.R. Civ. P. 52(a).

FINDINGS OF FACT

1) Plaintiff Jack R. Cremeans was employed by the City of Roseville as a police patrolman from May 1, 1967 up until January 7, 1981.

2) Defendant, Thomas Asman, was at all relevant times, the Chief of Police of the City of Roseville Police Department and a member of the City of Roseville Retirement Board.

3) Defendant Thomas Van Damm, Margaret Spybrook and Leonard Haggerty were, at all relevant times, members of the City of Roseville Retirement Board.

4) Defendants City of Roseville, Roseville Police Department, Roseville Police Officers Association and the City of Roseville Retirement Board were initially parties to this action. At trial, however, plaintiff withdrew all claims against

these municipal defendants, leaving only the individual defendants remaining.

5) On August 29, 1985, the jury rendered a verdict in favor of plaintiff on his claim that his January 7, 1981 involuntary retirement was accomplished without due process of law. The jury verdict was limited to defendants Asman and Van Damm. No verdict was rendered against the remaining individual defendants.

6) The jury further awarded punitive damages against defendants Asman and Van Damm for the due process violation.

7) Plaintiff is presently employed in the field of real estate management.

8) Plaintiff has a history of heart disease, high blood pressure, osteoarthritis, and knee ligament and cartilage damage. Based upon these facts, various medical testimony admitted concluded that plaintiff is incapable of performing his job as a police officer.

9) Defendant Van Damm is presently a member of the Roseville Retirement Board; defendant Asman is not.

CONCLUSIONS OF LAW

1) Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a state and represent it in some capacity, whether they act in accordance with their authority or misuse it. *Ex Parte Virginia*, 100 U.S. 339, 346-47 (1879).

2) 42 U.S.C. § 1983, enacted by Congress, provides, in relevant part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

3) Section 1983 authorizes federal courts to grant broad relief in equity or other proper proceedings in order to provide a comprehensive remedy for the deprivation of constitutional rights. *Monroe v. Pape*, 365 U.S. 167 (1961).

4) Reinstatement is an equitable remedy in the nature of mandatory injunction.

5) Since equity normally acts in personam, a court does not have power to issue an order against a person who is not a party to the action. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969).

6) An injunction is, therefore, binding only upon the parties to an action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them. F.R. Civ. P. 65(d).

7) Stated differently, a Rule 65 injunction binds not only the parties defendant but also those identi-

fied with them in interest or in "privity" with them, such that a defendant may not circumvent a decree of the court by carrying out acts through aiders and abettors. *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945); 7 Moore's Federal Practice, ¶ 65.13; 11 Wright and Miller, *Federal Practice and Procedure* § 2956.

8) In order for a judicial decree to be binding on a nonparty by virtue of the privity concept, the nonparty and party must be so identified in interest such that they represent the same legal right and it is reasonable to conclude that their rights and interests have been represented and adjudicated in the original injunction proceeding. Generally speaking, only if a person has acted in concert with those named in the injunction or is an officer, agent, servant, employee, or attorney of a named party is he in privity with parties to the injunction proceeding. *Id.*

9) The terms of an injunction may not be enlarged beyond the scope defined by Rule 65. *Regal Knitwear, supra.*

10) The Court has broad discretion whether to exercise or decline to exercise its power to enjoin public officials in the performance of their duties. *Grace v. Burger*, 524 F. Supp. 815 (D. D.C. 1980).

11) Injunctive relief is an extraordinary remedy and a plaintiff seeking such relief bears a heavy burden of proof. *Hecco Ventures v. Avalon Energy Corp.*, 606 F. Supp. 512 (S.D.N.Y. 1985).

12) Since, as the Court's findings of fact indicate, the municipal defendants have been dropped from this lawsuit, there remains neither a party defendant nor a nonparty privy capable of providing the injunctive relief requested by plaintiff. To conclude otherwise would be to assess vicarious liability against a municipal defendant in direct contravention to the rule announced in *Monell v. New York Dept. of Social Services*, 436 U.S. 658, 694 (1978).

13) The Court concludes, therefore, that the balance of hardships weigh in defendants' favor such that reinstatement is not appropriate.

CONCLUSION

14) Accordingly, for the reasons stated, the Court shall enter an appropriate judgment consistent with the findings herein.

IT IS SO ORDERED.

/s/ James Harvey
JAMES HARVEY
United States District Judge

APPENDIX 4

No. 86-1401/1466

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACK R. CREMEANS,	)	
	)	
Plaintiff-Appellee, Cross-Appelant,	)	
	)	
v.	)	
	)	
CITY OF ROSEVILLE, ET AL.,	)	ORDER
	)	
Defendants,	)	
	)	
THOMAS A. ASMAN; T. VANDAMME,	)	
	)	
Defendants-Appellants, Cross-Appellees.	)	

BEFORE: ENGEL, Chief Judge; LIVELY and KRUPANSKY, Circuit Judges

(Filed Dec. 14, 1988)

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the peti-

tion were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX 5

MICHIGAN COMPILED LAWS § 38.514

Sec. 14. The tenure of every one holding an office, place, position of employment under the provisions of this act shall be only during good behavior and efficient service; and any such person may be removed or discharged, suspended without pay, deprived of vacation privileges or other special privileges, by the civil service commission for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment to the public, neglect of duty, violation of the provisions of this act or the rules of the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance or nonfeasance in office: Provided, however, No member of any fire or police department within the terms of this act shall be removed, discharged, reduced in rank or pay, suspended or otherwise punished except for cause, and in no event until he shall have been furnished with a written statement of the charges and the reasons for such actions, and all charges shall be void unless filed within 90 days of the date of the violation, except in the case of a probationer, whose violations may accumulate for the probationary period. In every case of charges having been made a copy of the statement of reasons therefor and answer thereto, if the person sought to be removed desires to file such written answer, shall be furnished to the civil service commission and entered upon its records. Such answer shall be filed by the member within 5 days after service of the charges upon him. If the person sought to be removed or reduced shall demand it, the civil

service commission shall grant him a public hearing, which hearing shall be held within a period of 10 days from the filing of the charges in writing and a written answer thereto. Pending the period between the making of the charges as a basis for removal and the decision thereon by the commission the member shall remain in office. At such hearing the burden shall be upon the removing officer to justify his action. In the event that the removing officer fails to make charges to the satisfaction of a member or members of a fire or police department in a city, village or municipality, such member or members of a fire or police department may present the information to the civil service commission. In event that the civil service commission fails to justify the action of the removing officer then the person sought to be removed shall be reinstated with full pay for the entire period during which he may have been prevented from performing his usual employment, and no charges shall be officially recorded against his record. A written record of all testimony taken at such hearing shall be kept and preserved by the civil service commission, which record shall be sealed and not be available for public inspection, in event that no appeal shall be taken from the action of the commission. In event that the civil service commission shall sustain the action of the removing officer the person removed shall have an immediate right of appeal to the circuit court of the county wherein the city, village or municipality is situated. Said appeal shall be taken within 90 days from the entry from the civil service commission of its final order; upon such an appeal being taken and docketed with the clerk of the circuit court of said county, the circuit court shall proceed to hear the appeal upon the original

record taken therein and no additional proof shall be permitted to be introduced. The circuit court's decision shall be final, saving the employee, however, the right to petition the supreme court for a review of the court's decision. The removing officer and the person sought to be removed shall at all times, both before the civil service commission and upon appeal, be given the right to employ counsel to represent either of them before said civil service commission and upon appeal; should the person removed elect to appeal to the circuit court as hereinbefore provided.

If for any reasons of economy it shall be deemed necessary by any city, village or municipality to reduce the number of paid members of any fire or police department, then said municipality shall follow the following procedure:

Such removals shall be accomplished by suspending in numerical order commencing with the last man appointed to the fire or police department, all recent appointees to said fire or police department until such reductions shall have been accomplished: Provided further, however, That in event the said fire or police department shall again be increased in numbers to the strength existing prior to such reductions of members the said firemen or policemen suspended last under the terms of this act shall be first reinstated before any new appointments to said fire or police department shall be made.

APPENDIX 6

MICHIGAN GENERAL COURT RULES, 1963

Rule 711 Superintending Control.

.1 Scope of the Order of Superintending Control. An order of superintending control may be used in any fashion necessary to implement the superintending or supervisory control power of the court over inferior tribunals.

.2 Policy as to Use of the Order of Superintending Control. The order of superintending control should not be issued if another plain, speedy and adequate remedy is available to the party seeking the order.

.3 Writs Superseded by Order of Superintending Control. The following writs are superseded and an order of superintending control shall be used in their place:

(1) Certiorari;

(2) Mandamus, when directed to an inferior tribunal or officer thereof; and

(3) Prohibition.

.4 Jurisdiction.

(1) The Supreme Court, the Court of Appeals and the circuit courts have jurisdiction to issue superintending control orders to inferior courts and tribunals.

(2) In cases in which an application for leave to appeal to the Supreme Court or Court of Appeals is permitted, that method of superintending control shall be used. In the event that superintending

control is sought and leave to appeal is available, the application for superintending control shall be considered as an application for leave to appeal. [As amended, Jan. 1, 1965.]

.5 Application for Superintending Control.

(1) Complaint. The party seeking superintending control in the circuit court may file a complaint with the court or present it to the judge. If the complaint is presented to the judge, it shall be filed whether or not the relief is granted.

(2) Motion to Vacate Order not Necessary. If an order or determination of any court or judge is reviewable in superintending control proceedings, and if the order or determination was made after hearing counsel in opposition thereto, it is not necessary to move for the vacation of the order or determination before instituting superintending control proceedings to review the order or determination.

.6 Issuance of Order or Order to Show Cause; Dismissal.

(1) Who May Issue or Dismiss. Upon the filing of a complaint, or upon its own motion, the circuit court or a judge thereof may issue an order to show cause why the order requested should not be issued, or may issue the order, or may dismiss the action.

(2) Records to Accompany Answer. The court or judge thereof may indicate in the order or order to show cause what records and papers shall ac-

company the answer, or the court or judge may indicate that any records and papers specified in the complaint shall accompany the answer.

(3) Stay of Proceedings. If a stay of proceedings is granted the order or order to show cause shall so state.

.7 Answer. The answer to the complaint shall be filed within the time specified in the order. The answer shall be accompanied by all papers required by the order.

.8 Time for Hearing. Superintending control proceedings shall stand for hearing upon the day specified in the order or order to show cause unless the court for cause shown orders a postponement of the hearing.

APPENDIX 7

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-1401/1466

JACK R. CREMEANS,

Plaintiff-Appellee,
Cross Appellant,

v.

CITY OF ROSEVILLE, a municipal corporation, et al.,

Defendants-Appellants,
Cross Appellees.

Before: ENGEL, Chief Judge*;
LIVELY and KRUPANSKY, Circuit Judges.

JUDGMENT

(Filed Oct. 28, 1988)

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of

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*The Honorable Albert J. Engel assumed the duties of Chief Judge effective April 1, 1988.

the said district court in this case be and the same is hereby reversed and the case is remanded for dismissal of the action on the merits.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

/s/ Leonard Green
Clerk

Issued as Mandate:
January 3, 1989

A True Copy.

COSTS: NONE

Filing fee .....$
Printing .....$
Total .....$

Attest:

_____
Deputy Clerk

APPENDIX 8

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JACK R. CREMEANS,

Plaintiff,

vs.

CIVIL ACTION
NO. 82-30096 PH

CITY OF ROSEVILLE, a
municipal corporation,
et al.,

---)

ORDER AND JUDGMENT

(Filed February 7, 1989)

Consistent with the Sixth Circuit's judgment of January 3, 1989, the Court DISMISSES the plaintiff's action and enters judgment in favor of the defendants.

IT IS SO ORDERED.

/s/ James Harvey
JAMES HARVEY
United States District Judge

APPENDIX 9

JUDGMENT ON JURY VERDICT
FOR THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

JACK R. CREMEANS,

Plaintiff,

vs.

CIVIL ACTION
FILE NO.
82-CV-30096-PH

THE CITY OF ROSEVILLE, et al.,

Defendants.
_____)

(Filed August 29, 1985)

This action came on for trial before the Court and a jury. Honorable James Harvey, United States District Judge, presiding. The issues having been duly tried and the jury having duly rendered its verdict, it is ordered and adjudged that plaintiff recover from defendants Thomas Asman and Thomas Van Damm One Hundred Thousand, Six Hundred Twenty-five Dollars ($100,625.00) in compensatory damages. It is also ordered and adjudged that plaintiff recover Five Thousand Dollars ($5,000.00) in punitive damages from Thomas Asman and Three Thousand Dollars ($3,000.00) in punitive damages from Thomas Van Damm.

Dated at Port Huron, Michigan, this 29th day of August, 1985.

ROBERT A. MOSSING
Clerk of Court
By: /s/
Deputy Clerk

APPENDIX 10

CHAPTER 15 CHARTER OF CITY OF ROSEVILLE, MICHIGAN

Sec. 15.22 *Total and permanent disability; retirement; benefits.*—(a) Upon the application of a member, or his department head, a member who (1) is in the service of the city, (2) has ten or more years of credited service, and (3) has become or becomes totally and permanently incapacitated for duty in the service of the city, by reason of a personal injury or disease, may be retired by the board; provided, that, after a medical examination of the said member, made by or under the direction of the medical director, the medical director certifies to the board (1) that the said member is mentally or physically totally incapacitated for duty in the service of the city, (2) that his incapacity will probably be permanent, and (3) that the said member should be retired; provided, further, that the report of the medical director is concurred in by the board. Upon his retirement, a member shall receive a disability retirement allowance provided for in section 16.23 hereof if he is a covered member, or as provided in section 16.24 hereof if he is a non-covered member.

(b) Any member with less than ten years of credited service shall have his credited service increased to ten years for the sole and exclusive purpose only of qualifying for disability retirement as provided in paragraph (a) of this section; provided, that (1) the board finds his total and permanent incapacity is the natural and proximate result of a personal injury or disease arising out of and in the course of his actual performance of duty in the service of the city, and (2) he is in receipt of workmen's compensation on account of his said total and permanent incapacity.

APPENDIX 11

THE UNIVERSITY OF MICHIGAN
ORTHOPAEDIC SURGERY

September 30, 1980

To Whom It May Concern

RE: Jack Cremeans
1604 963 3

The above-named patient has been under my care since 5-21-80. He presented in my office complaining of problems with both knees, which had been present for a number of years. Mr. Cremeans underwent surgery of the right knee September 10, 1980.

I recently saw Mr. Cremeans for a follow-up evaluation (9-17-80). Mr. Cremeans is concerned about his future. He works as a traffic cop. I think that in view of the arthritic changes in the knee joint, he is advised to consider changing jobs, to one that did not require him to be on his feet as much as a police officer would.

If I may be of further assistance to you in this matter please contact my office (313) 763-1219.

Sincerely yours,

/s/ Gerald A. O'Connor
Gerald A. O'Connor, M.D.
Assistant Clinical Professor
Section of Orthopaedic Surgery

GAO:jal

APPENDIX 12

DETROIT INDUSTRIAL CLINIC

December 16, 1980

City of Roseville
29777 Gratiot
P. O. Box 290
Roseville, MI 48066

ATTENTION: Tom VanDamme

RE: CREMEANS, Jack P.
25383 Fern
Roseville, MI 48066

SS # 232-62-4174
Our File # E 980521

Dear Mr. Van Damme:

Jack Cremeans, age 40, was seen at your request and examined at the Detroit Industrial Clinic by the undersigned on December 10, 1980.

HISTORY: This man is working as a patrolman and has been for fourteen years. He states that he has had injuries in the past to his knees. He originally was injured at football. He had surgery after high school and on two occasions in 1966 for joint mice of the right knee. His original knee was the left knee. He had surgery on it. Then some ten years later he started having trouble with the right knee. The right knee has been the most difficult of the two. The right knee was last operated in 1976 as a result of a fall on vacation while in Pennsylvania.

On September 10, 1980, he had an arthroscopy of the right knee in Ann Arbor. No surgery was done.

As a child, he had injury to the left knee. The injury is unknown. He then had a cartilage removed in 1958 med-

ially from the left knee. His knee has locked and gone out once in the past year. He originally had left knee problems and surgery and then some ten years later as mentioned previously he started having problems with the right. He states he had to have the right knee and ankle reconstructed in 1976 after the fall while on vacation. He states he has a Lenox Hill Brace, but does not wear it at work. He does occasionally use an Ace bandage on the knee. He believes he tends to bow out on the right. He has muscle soreness at times about the knee. He does leg lifting, but no weight lifting. He has had up to 70 pounds on the lower extremities from time to time. His right ankle has been hurting him a bit the past five or six weeks. He has had two aspirin last evening. He has had none today. He has had no Motrin which he takes on occasion today.

PAST HISTORY: Operations—Above; he has had bilateral hernias operated; he had a left ear operation as a child; he has had two tailbone operations probably for pilonidal cysts. He had some backache following a spinal tap in the past. Illnesses—Usual childhood diseases. No history of cancer, tuberculosis or diabetes. He is allergic to Novacaine he believes. Service—Yes. Injuries—Above. He has been in frequent altercations while making arrests from time to time.

SYSTEM REVIEW: EENT complaints—He has had sinus problems in the past. He has had a broken nose on numerous occasions. Chest/cardiovascular-respiratory-blood pressure has questionably been up in the past. He is not treating for this nor has he. Gastro-intestinal complaints are absent. He occasionally has an upset stomach.

X-rays have been negative in the past. Genito-urinary complaints are denied. Neuro-psychiatric history—He had some emotional upset some four years ago when he had problems resulting from a shooting episode. He saw a psychiatrist at that time once and following this he had some psychiatric or psychologic testing. He has had no continuous treatment of any kind at this time.

EXAMINATION: He is 5′ 11″ tall and weighs 226 pounds. He gets about very well. The knees only are examined.

On standing the legs appear in essence straight. When bearing weight, there is no to and fro motion when pressure is applied to the side and medial aspect of the leg. There is no evident swelling at this time. There is a medial para-patellar scar present on the right and there is a transverse scar about the left knee. There is a scar about the right ankle. These are all well healed. Heel and toe and one leg standing are stable. He squats with buttocks nearly approaching heels and recovers readily. No support is needed other than for balance. Fingers go to lower third of the leg on forward bend. Recovery is excellent.

In the sitting position, knee and ankle jerks are equally active either side. Straight leg maneuver is absent. There is left medial collateral laxity noted. There is right lateral collateral laxity noted in manipulating the knees. Grinding signs are absent. There is no drawer sign present either side. McMurray sign is felt to be absent. There is crepitus either knee, equally so. Straight leg raising goes to 90 degrees then to 120 either side. Toes flex and extend well and strongly. Dorsalis pedis and posterior tibial pulses are equally good either side. Skin is clear.

Hair distribution is normal. Pinprick is appreciated in either area. Babinski is absent. Spine to malleolus measurements are 35½" right, 36" left; calf is 15" bilaterally; mid-thigh is 21".

X-RAYS—I requested films of the knees which were interpreted by R. Noon, M.D., Radiologist. See attached report. The films were reviewed by me.

CONCLUSION: Mr. Cremeans has evidence of multiple surgical procedures probably to both knees. However, it is possible that one of these scars may represent a laceration during his youth. He has findings consistent with left medial and right lateral collateral laxity of the corresponding knees. There are x-ray changes consistent with osteoarthritis. These findings would not disqualify him from ordinary labor such as in a factory situation, but these knees put under stress, such as is frequently present in his work as a patrolman which could be running, jumping and twisting repetitively for various lengths of time, could conceivably cause him to have significant problems in terms of the onset of pain and in terms of an inability to perform in a severe stress situation.

In view of the presence of these problems and the possible sequelae I have noted, I would have serious doubts as to Mr. Cremeans' physical ability to continue to perform as a patrolman.

Sincerely yours,

/s/ Norman R. Wilson, M.D.
Norman R. Wilson, M.D.

NRW:bc 12-30
Encl.

APPENDIX 13

PARTIAL TRANSCRIPT OF RETIREMENT BOARD MEETING
JANUARY 7, 1981

* * *

(p. 5) Van Damme: (continued) we really need to take any action on that, Leonard.

Haggerty: Yeah, okay.

Asman: I'll make a motion that we add items 4 through 10 under new business to the agenda.

Haggerty: Support.

Van Damme: Motion by Asman, seconded by Haggerty to add the items 4 through 10 on the agenda. All in favor?

Asman, Haggerty, Spybrook: Aye.

Van Damme: Aye. First item on the agenda is the disability retirement of Jack Cremeans as requested by Chief Asman.

Haggerty: What's the story?

Asman: Uh, he brought in a letter a couple months ago from a doctor at the University of Michigan Hospital stating that in this doctor's opinion he had serious doubts as to his ability to continue as a police officer due to the condition of his knees. We then checked with the City Attorney and he gave an opinion that we probably had no choice but to have me put in for his disability retirement and have him checked, otherwise if something should occur we could be sued by the officer or anyone he was unable to help. I did then put in for a disability retirement and we sent him to the city, the retirement board's medical

examiner and we got the report back. The last paragraph, it goes (p. 6) into a lot of medical terminology but the last paragraph . . .

Haggerty: Now is he . . . Tom, . . .

Asman: Pardon?

Haggerty: Is he requesting, Jack wants this or . . . ?

Asman: He didn't seem to really care one way or the other and the last . . .

Van Damme: . . . see if I can get Jack in here . . .

Asman: . . . paragraph says "in view of the presence of these problems and the possible circumstances I have noted I would have serious doubts as to Mr. Cremeans' physical ability to continue to perform as a patrolman." So he agreed with the other doctor.

Haggerty: Hm . . .

Asman: His knees apparently are, he had a . . . back in late '78 he injured his knee at a boat company, he was looking at a boat and he was off 87 days then and came back to work and then he was off again this past fall for about 21 days with his knees. He had another operation as I understand.

Van Damme: Did you get a copy of this letter?

Haggerty: Pardon?

Van Damme: Did you get a copy of this letter?

Haggerty: Yeah I think I . . . I think I received one. Is that the one that Tom just read?

Asman: I just read the last paragraph.

(p. 7) Spybrook: Think it was . . . a letter that we got.

Van Damme: Okay, yes I got it. In as much as Mr. Cremeans is here tonight, would you care to step up to the microphone we'd like to, I'd like to ask you a few questions regarding this and the fact that I believe you are aware of the fact that as the charter states that the department head can request the retirement. Yes.

Cremeans: Yes I am aware that the Chief has that opportunity with the Charter.

Haggerty: Jack are you request . . . are you requesting at this time a disability? Is this . . .

Cremeans: No I have not.

Haggerty: Oh.

Van Damme: Do you feel that you're . . . a conclusion that . . . and I think you, um Chief Asman did apprise you of the letter that the board did get from the medical director from the physical that you took.

Cremeans: He gave me a copy of the third page.

Van Damme: Uhm . . . mm (affirmative) Do you agree or disagree, do you have any, can you give the board some of your feelings on this? Are you in agreement with the retirement or opposed to it? What are your feelings about it.

Cremeans: Well due to the fact I have not had the opportunity to get counsel I was notified of this meeting yesterday and some questions as to my rights, I could (p. 8) not give you an answer right now.

Haggerty: Jack I think the feeling of the board, at least my feeling is, you know, it's up to you.

Cremeans: Yeah well I do not have any understanding . . .

Haggerty: I just assumed and I thought I was under the impression that you were asking for a disability retirement.

Spybrook: That's what I thought too.

Haggerty: That's what I thought.

Cremeans: No I was informed by Chief Asman that he was takin' it out of my hands and that he had the opportunity by the city charter, as stated in I think it's section 1523 that he was gonna require me to take a physical.

Haggerty: Well that's . . . that's his . . . that's his job.

Asman: Course Jack . . . course Jack you have to bring up the fact that this was all based on a letter that you brought in. This was not something that I initiated, this was something you initiated by bringing in a letter from the University of Michigan saying that you were unfit to perform as a police officer.

Cremeans: Well if I . . .

Asman: I had no choice but to do what I did.

Cremeans: If I remember correct, the letter I brought in from my doctor in Ann Arbor stated that we've talked and (p. 9) he has advised me to change occupations. And if I remember correct, Chief Asman question was to me, what was the interpretation of that and he was going to

seek a legal opinion. And I assumed he did seek a legal opinion then I was notified I would be required to take a physical, as requested by the Chief, as stated in the charter.

Haggerty: Well Jack right now do you think that you could still perform and you want to remain then as a police officer.

Cremeans: There . . . there's doubts in my mind.

Haggerty: Oh there is doubts, you're not sure yet if you want to . . .

Cremeans: . . . I'll be very honest with you. The knee is bad. From what the doctors opinions I've talked and I've seen four to five specialists. It's not gonna get any better even with my therapy program I'm involved in and there's doubts as to my main concern is I really honestly feel like maybe I might jeopardize my own physical being more so or I might be out there and jeopardize another officer or a citizen.

Haggerty: Well Jack . . .

Cremeans: That's bein' honest as I can.

Haggerty: Well I understand that but what, do you want us to table this? Do you want us to act on it? You know, what I'm tryin' to find out, do you want a retirement or not?

(p. 10) Cremeans: Well, like I say is the Chief has requested it and like he said I think he's taken it outta my hands cause I honestly don't know if I do or not.

Haggerty: Well then I hate to you know make a motion to grant it then if you don't want it. Or if you feel like you could still work.

Cremeans: Well I . . . I . . . I understand your feelings you know and basically that's all I can really say, you know. I know the Chief has asked me if I wanted one and I can't . . . I can't honestly give him an answer . . . (inaudible)

Asman: Well there's one other problem Mr. Mayor. Now that we have this report from the doctor uh there's no way, based on this report, until I got one contrary to it that I could allow him to work anyway.

Powell: We're kind of . . . excuse me, for the record I'm Bill Powell, President R.P.O.A., what kind of leave would he be on then Chief?

Asman: If this board . . .

Powell: If this board didn't rule or . . . or pass that he be on a disability retirement then this officer would have to be placed on some type of a injury leave or sick time or whatever. I think that's the answer we're looking for.

Asman: I really don't know because each time he's been off with an injury to his knee, he's got a clearance from (p. 11) a doctor to come back to work. So I really don't know what kind of leave he'd be on.

Powell: Well all the officers in Roseville are like that, they're all dedicated, they want to come back to work. (inaudible) . . .

Spybrook: Would there be any kind of work he could do inside that wouldn't . . .

Powell: No the . . .

Asman: We have a city rule unless they're 100% able to perform all duties they're not allowed to work.

Spybrook: Oh, I just thought . . .

Powell: Yeah, you gotta be 100% . . .

Asman: There isn't, we have no light duty in Roseville. They do in other cities but they don't in Roseville.

Spybrook: Okay, I . . .

Powell: If we could request of this board I'd like a five minute recess.

Van Damme: Fine.

Powell: Alright.

Haggerty: I make a motion to recess for five minutes.

Spybrook: Support.

Van Damme: Ready to go back on?

Powell: Yes sir I am.

Van Damme: Proceed.

Powell: We're back on? Thank you. So we can, everybody can understand, Officer Cremeans is not here requesting (p. 12) that he be put on a disability retirement. Officer Cremeans is here for the sole reason because he was ordered to go to the city doctor and we got the response from the city doctor which still, in my mind and also Officer Cremean's mind, there's a little doubt because it says page three and that's all we got a copy of is page three. I don't know what page one and two were.

Van Damme: We can provide you with the balance of it, that's no problem. Kay will see that you get it.

Powell: Okay.

Asman: Generally, we just get the page that gives the conclusion because generally the rest of it's all strictly medical language that most of us really don't know what they're talkin' about anyways.

Van Damme: In the past . . . (inaudible)

Asman: You usually gotta get down to the last paragraph before you find out what they're saying.

Powell: Okay, well as I say we didn't know what page one and page two said and we would request of this board . . .

Van Damme: Kay would you see . . . Kay would you see that they get a copy of . . . of the balance of the . . . or a full copy of the report.

Kay Hill: I have a form to sign and then I can give it to you.

Powell: Well I don't know if this officer's gonna sign any forms before we get page one and two.

(p. 13) Van Damme: No, no it's a form requesting . . .

Kay: No, just . . . just to get a copy of it.

Powell: Oh fine. We'll sign it then and get a copy.

Kay: Just to keep on record that he has a copy.

Powell: Okay. So it's understood the officer is not here, Officer Cremeans is not here requesting a disability, it was on the city's part that he went to the doctor and the doctor, from his letter on page three did state in view

of his presen problems the possibility that he has serious doubts of Officer Cremean's physical ability to continue to perform as a police officer is doubtful. We would, the union would request that if this board is to move tonight that Officer Cremeans be put on a disability that it be a off the job injury. The reason I say that it would be an off the job injury is because as the Chief of Police's records would reflect, the same as mine, that Officer Cremeans hurt his knee off the job at a boat company and hurt his knee and his ankle and he was off from November 4, 1978 until March 4, 1979 for a total of 87 working days. He then came back to work. We feel strongly this was the reason that's caused this problem that we're here tonight for. That it was an off the job injury. I understand that Officer Cremeans has been off and I think the Chief of Police can correct me if I'm wrong, three or four different occasions where he had been (p. 14) off three or four different days because of his knee and it was a workman's comp. on the job injury.

Asman: I brought that to the board's attention that we've had four occasions from, between 1972 and '77 he sustained minor injuries. A couple times twisted his leg, once was bumped by a car but in no case was he off, I think in only two cases was he off at all. Two cases he was right back to work the same day, didn't lose any time at all. Just reported it, you know, in case something developed and one case he was off four days and the other time I think he was off three days. But they were just minor things.

Powell: That's a sign of dedication, right? As I said earlier. We request if this board does move that the disability be an off the job injury?

Asman: I brought in the workman's comp. just so the board would be apprised but I also advised them that it was my complete understanding and belief that this was definitely caused by an injury off the job, not on the job.

Van Damme: (inaudible)

Powell: I have no more for the board. Thank you for your time.

(p. 15) Asman: Do you have anything else to say Jack?

Cremeans: Like I stated before, Mayor Haggerty you asked me if I'm requesting this disability. It's a heck of a decision.

Haggerty: Yeah I know. I imagine it is.

Cremeans: I could not give Chief Asman a decision, I could not even give Officer Powell here a decision cause I really don't know. The only thing I can state and in all honesty is that I do have my doubts as to the circumstances I entail that maybe if circumstances arised I might not be able to perform my job. But more so I could do more injuries to myself or to someone else, another officer or even a citizen. This is the discusson I had with my doctor in Ann Arbor and like I stated his letter states that I should consider changing. The doctor letter I understand from Doctor Wilson I believe it is, is like most doctors I'd leave room of doubt. There's words in there probable and he had serious doubts. I guess really what it is is that I don't know what I want to do. The chief took it outta my hands, I'm gonna dump it back into your hands. But if, bein' honest with ya, this is the way I feel.

Asman: Well, I would say at this time that since I sit here under, you know as a representative of Jack but also (p. 16) since I'm the Chief of Police, I'm gonna take it out of your hands, I'm gonna make a motion that we grant the disability retirement effective immediately.

Spybrook: Is that what you want?

Van Damme: Jack, I will support that motion by the way. Jack I have one, one comment okay, and I think you're familiar with Andy Viner's case. Okay? Andy, we . . . this board did grant Andrew Viner a disability and I think it was a duty disability but there's no difference between a duty, some of the benefits are different. Should you find or can you prove, I think maybe in the coming weeks, coming months, coming years, okay, that your knees are in such a condition, okay, that would then allow you to perform the duties of a police officer, you have the right to come back to this board and to be restated, okay.

Asman: We also, the board also has the right, you know, to occasionally send you back for new physicals to see if there has been improvement.

Van Damme: Okay, I . . .

Cremeans: (inaudible) . . . charter and the rights pertaining to . . . (inaudible) . . . the question I basically had with Officer Powell is simply on the job, off the (p. 17) job, what I'm going to be entitled and all . . .

Van Damme: Yeah.

Haggerty: Yeah, right you got to think of this . . .

Asman: Off . . . on the job you would be entitled to 50% of your present base pay. Off the job, the way the

charter reads is you are entitled to 50% of your final average compensation which would be five consecutive years out of the last ten, the average pay for those five years, and I would assume that includes total pay, because it says compensation, not just base pay.

Spybrook: Do they, do you have or does the police have social security?

Asman: No.

Spybrook: No, I didn't think . . .

Powell: We pay all our money to our retirement system to the city . . . Van Damme . . .

Van Damme: . . . to the union.

Spybrook: We got it all.

Powell: Strike that. I got to run for re-election in May. Right?

Haggerty: That's right.

Van Damme: Motion by Asman, seconded by myself to approve, effective immediately, the dis . . . non-duty disability (p. 18) of Mr. Jack Cremeans. All in favor?

Asman, Haggerty, Spybrook: Aye.

Van Damme: Aye. Nays, none. Jack . . .

Asman: . . . you could stop by one day this week and see me. I got some things . . .

Tape turned off at this point.

11/2/82 Tape transcribed by Jan Tremonti, Clerk in the Roseville Police Department, Detective Bureau.

APPENDIX 14

GROESBECK INDUSTRIAL MEDICENTER, P.C.
30420 Groesbeck - Roseville, MI 48066 - (313) 775-8800

January 21, 1983

City of Roseville
29777 Gratiot
P.O. Box 290
Roseville, MI 48066

Re: Evaluation Report Jack Cremeans

Employer: City of Roseville

Date: January 20, 1983

Time: 2:00 P.M.

Attention: Mr. Mickey Todd

Dear Mr. Todd:

This 42 year old white male presented for evaluation with essentially no complaints. He has been retired for the past two years secondary to bilateral knee problems. At this time, he states he has only occasional right knee pain and "muscle cramps" in his right leg. He claims that he actively exercises his legs daily with walking and specific strengthening exercises for his knees.

He admitted to numerous prior injuries to his knees, all of which occurred while off his job. Approximately 4-5 years ago he fell, while in Pennsylvania, injuring his right knee and ankle. His ankle was casted and his knee was treated with rest. Subsequently he did require surgery for a "torn lateral ligament" in his right knee. His recuperation included physical therapy and during a therapy session he "felt something pop in his right knee". Several days later his knee became swollen and required aspira-

tion. Although feeling as if "something was loose" in his right knee, he returned to work after being off about 4 months. His knee continued "to irritate" him however and in September 1980 he underwent arthroscopic lavage of his rigrt knee with excellent results. He felt 100% better but after undergoing an evaluation was placed on retirement.

Mr. Cremeans also had numerous injuries to his left knee in childhood. Apparently, he was hit by a bus and had some football injuries which required surgical treatment. He denies any left knee pain.

On May 31, 1981 he apparently had a myocardial infarction and was hospitalized at Bi County Hospital in Warren, Mich. for 2 weeks. Angiography was performed at St. Josephs Hospital in Mt. Clemens, Mich. and apparently showed "some blockage" but he denies the necessity for further surgery. He denies chest pains, dyspnea, dyspnea on exertion, palpitations, pretibial edema. He states that he has hypertension but that it is intermittant in nature.

Medications—Isordil 2.5 mg P.O. QID, Persantine 25 mg P.O. TID, Vitamins.

Allergies—NKA

Social history—positive greater than 50 pack years cigarettes, occasional binge alcohol, 4-6 cups coffee/day. He has been retired for 2-years from the City of Roseville Police Department.

Past medical history—positive usual childhood diseases, hypertension, myocardial infarction, arthritis both knees.

Past surgical history—T & A, left herniorrhaphy 1953, right herniorrhaphy 1977.

Left knee cartilage repair 1960, Left knee bone chip removal 1966

Right knee lateral ligament repair 1978, Right knee arthroscopy 1980

Crushed coccyx repair x2, Hemorrhoids 1973

Past family history—Mother deceased with hypertension, diabetes mellitos, and CVA at age 64. Father deceased with cerebral hemorrhage and CVA at age 67. Six siblings, 1 brother with hypertension and severe coronary artery disease and a second brother with angina.

Review of systems—Gl-positive hemorrhoids; GU-negative; CV-positive see chief complaint: Respiratory-positive sinusitis; NM-positive see chief complaint.

Physical examination—42 year old white male in no apparent distress, alert and oriented to time, place and person.

5'11½" 205 lbs.

BP 164/104 — AP 76 — R 16 — T 98.6

HEENT

positive fluid behind right tympanic membrane, rhinorrhea, dental caries

NECK

positive anterior, superior cervical nodes, negative bruits; thyroid unremarkable

THORAX

HRRR without murmurs, clicks, or rubs

LUNGS

CTA — AF

ABDOMEN

positive scars right and left inguinal regions and right posterior lumber region. Bowel sounds x4 negative mass, tenderness or organomegaly

MALE GENITALIA

negative hernia; testes descended without masses

NEUROMUSCULAR

CN II-XII grossly intact. Cerebellar function intact; no motor or sensory deficits; Deep tendon reflexes brisk and equal. No Hoffmans, Babinskis, Chaddocks or Oppenheims reflex.

EXTREMITIES

Upper extremities within normal limits. Extensive scarring posterior thighs apparently from burns. Extensive surgical scars bilateral knees. Orthopedic evaluation of the knees revealed some crepitance in the right knee on McMurray's maneuver without pain or locking. On adduction of the right knee and abduction of the left knee there was noted laxity. The remainder of the Orthopedic exam of his knees were negative. Apley's Drawer, left McMurray's and Chaddocks were all negative. Quadraceps and hamstring strength was excellent bilaterally. Pulses of the lower extremities were strong and equal. No evidence of motor or sensory deficit. Deep tendon reflexes were brisk and equal. No Babinski, Chaddocks, or Oppenheims.

X-RAY

Right and left knees extensive bilateral osteoarthritis with bilateral femur erosion, right medial cartilaginous calcification, tendonous calcifications, left intra articular floating calcification and left medial fibular erosion.

EKG

Possible old inferior wall myocardial infarction

IMPRESSION

(1) Coronary artery disease—status post MI
(2) Hypertension

(3) Extensive osteoarthritis bilateral knees
(4) Recent upper respiratory tract infection

RECOMMENDATIONS

Mr. Cremeans is not qualified for work due to hypertension and his prior history of myocardial infarction. His hypertension could be easily controlled with medication but with the coronary artery disease, I would hesitate to have him employed as a police officer. He has rehabilitated his knees nicely and has only the residual osteoarthritis remaining with minimal symptomatology .

Sincerely yours,

/s/ Michael A. Shelden, D.O.
Michael A. Shelden, D.O.

MAS/gg

No. 88-1524

In The

Supreme Court of the United States

October Term, 1988

JACK R. CREMEANS,

Petitioner.

vs.

CITY OF ROSEVILLE, a Municipal Corporation, CITY OF ROSEVILLE POLICE DEPARTMENT, THOMAS H. ASMAN, Chief of Police of the City of Roseville Police Department and member of the City of Roseville Retirement Board, ROSEVILLE POLICE OFFICERS' ASSOCIATION, a non-profit labor organization, THE CITY OF ROSEVILLE RETIREMENT BOARD, and T. VAN DAMME, MARGARET SPYBROOK, L. HAGGERTY and WILLIAM POWELL, Members of the City of Roseville Retirement Board, Jointly and Severally,

Respondents.

BRIEF IN OPPOSITION

TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

COUNTER-STATEMENT OF THE CASE

Petitioner claims that his right to procedural due process was violated by the manner in which he was given a medical retirement by the Roseville Police Department. Petitioner's lawsuit evoked 42 USC 1983, combined with certain State law claims. Petitioner prevailed on the civil rights claims against Defendants, Thomas Asman and Thomas Van Damme, winning in compensatory and punitive damages against each,

Supreme Court, U.S.
FILED
APR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

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COUNTER-QUESTIONS PRESENTED

I.

DID PLAINTIFF, AS A MATTER OF LAW, FAIL TO PRESENT SUFFICIENT EVIDENCE TO CREATE A JURY QUESTION THAT HIS RIGHT TO PROCEDURAL DUE PROCESS WAS VIOLATED, BY MEANS OF A "SHAM HEARING" OR OTHERWISE?

II.

IS THE DECISION IN THE INSTANT CASE IN CONFLICT WITH A DECISION OF THE 7TH CIRCUIT COURT OF APPEALS AND IF SO DOES THIS "CONFLICT MERIT GRANT OF A PETITION FOR CERTIORARI IN THIS COURT"?

III.

IS THE DECISION IN THIS CASE IN CONFLICT WITH ANY DECISION OF THE UNITED STATES SUPREME COURT?

IV.

WAS THE COURT OF APPEALS CORRECT IN DETERMINING THAT RESPONDENTS WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW?

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together with attorney fees. Petitioner's post-trial motion for reinstatement was denied.

The Court of Appeals for the Sixth Circuit reversed the judgment against Respondents, Asman and Van Damme, holding that Respondents were entitled to a directed verdict on the § 1983 due process claim. Plaintiff's Motion for Rehearing En Banc was denied.

COUNTER-STATEMENT OF FACTS

Petitioner, Jack R. Cremeans, joined the Roseville Police Department on May 1, 1967. (R 8-19-85, p 54). Cremeans had a long history of knee problems, going back to his high school football days. (R 8-19-85, p 170). A knee injury suffered while a member of the Air Force resulted in a medical discharge. *Id.*

During November of 1978, Cremeans injured his right knee in an accident on the premises of a boat supply company. (R 8-19-85, pp 86-87). Cremeans slipped and fell while walking along a darkened corridor. He missed several months of work and was compelled to undergo surgical treatment. (R 8-19-85, pp 87-91). Cremeans subsequently filed a lawsuit against the boat company, claiming, *inter alia*, wage loss and loss of wage-earning capacity. (R 8-19-85, p 173).

On January 7, 1981, a hearing of the Roseville Retirement Board was convened; present were Asman, Van Damme, Spybrook and Haggerty, four members of the 5-member retirement board. The fifth member of the board was not present and did not participate in the hearing. At that hearing, Petitioner was given an involuntary non-duty related medical retirement. The events preceding the retirement hearing, and details concerning the hearing itself, will be presented later.

This lawsuit was an unfortunate by-product of the medical retirement.

The proper focus here is upon the events which occurred during the fall of 1980 and early winter of 1981. On September 10, 1980, Cremeans underwent knee surgery. (R 8-19-85, p 94). He was absent from work from that date until October 1, 1980. (R 8-26-85, p 121). As Chief of Police, Asman was required to request that Cremeans produce a letter from a physician indicating that he was capable of returning to work. *Id.* Cremeans was notified of Asman's request by his supervisor, Lieutenant Giberson. (R 8-19-85, p 94). Cremeans did not produce a doctor's note showing fitness to work as a police officer; instead, he produced a letter from Dr. O'Connor of the University of Michigan Hospital informing Cremeans that he should change jobs. (Defendants' Exhibit 12; R 8-19-85, pp 94-95; R 8-26-85, pp 75-76, 121).

On November 3rd or 4th, 1980, when Cremeans showed Asman the O'Connor letter, Asman explained to him the possible consequences of the letter and in what sequence those consequences would transpire. (R 8-26-85, pp 94-96, 123, 124). Specifically, Asman said:

> "Well, after I had asked some other questions, I explained to Mr. Cremeans that I would have to submit this to the City Manager and to the City Attorney to find out what was going to occur, and then I said there are certain things that could occur."
>
> "If, in fact, they feel that he — it could be directed to put him in for a medical retirement. If I did that then the Retirement Board would send him to a doctor to be evaluated and if the

> doctor found that he was, in fact, unable to perform the duties of a police officer, then, he could be medically retired and there would be a hearing to that effect."
>
> "That was — as I explained it, that was the scenario." (R 8-26-85, pp 123-124).

At the November meeting, Cremeans questioned Asman concerning the retirement procedure, but gave Asman no indication that he wished to contest it. (R 8-26-85, pp 97-98). In fact, Cremeans expressed doubts about the viability of his knee, similar to those he would later voice at the retirement hearing. (R 8-26-85, p 135).

Asman then sought the advice of the City Manager, who in turn requested an opinion from the City Attorney, Russell LaBarge. (R 8-26-85, p 124). After receiving the City Attorney's opinion, Asman petitioned the retirement board to consider a medical disability retirement for Cremeans. (R 8-20-85, p 120; R 8-26-85, p 126). Asman had the authority to do so under the Roseville City Charter. (R 8-20-85, pp 128-129).

Asman's request was brought before the retirement board during December of 1980. (R 8-26-85, pp 126-127). The board issued a directive that Cremeans receive a medical examination. (R 8-20-85, p 121; R 8-26-85, p 127). Asman notified Cremeans of the results of that meeting. (R 8-26-85, p 128). Cremeans expressed concern about the nature of the retirement, and the impact it could have on his lawsuit against the boat company. He indicated that if he were compelled to retire, it would increase the award he could obtain in his slip-and-fall litigation. (R 8-26-85, p 129).

Pursuant to the retirement board's directive, Cremeans was examined by Dr. Wilson of the Detroit Industrial

Clinic. Wilson's report reached a conclusion unfavorable as to Cremeans' ability to perform his job as a police officer. Asman received a copy of that report on January 6, 1981. (R 8-26-85, p 127).

Cremeans was on patrol that afternoon and at approximately 2:30 or 3:00 p.m. he was notified that Chief Asman wanted to see him. (R 8-19-85, pp 97-98; R 8-26-85, p 78). While Cremeans was at the police station, he spoke with Officer Powell, President of the Police Officer's Union. (R 8-19-85, pp 99-100). Powell informed him that a retirement hearing would be held the following evening, January 7, 1981, at 6:00 p.m. *Id.* It was then about 4:00 p.m.; Cremeans had, therefore, by his own admission, about 26 hours' notice.

Only four of the five retirement board members were present at the January 7, 1981, retirement hearing. (R 8-20-85, p 119). The best evidence of what transpired at this meeting was the tape recording which was admitted into evidence and played to the jury. (R 8-26-85, pp 4-33). At the hearing, Cremeans was invited to make a statement, and did so. He indicated that he had not requested a retirement, that he had only one day's notice of the hearing, and that he had not had an opportunity to consult with an attorney. (R 8-26-85, pp 18-19). However, Cremeans was offered an opportunity to have the matter tabled, and declined to do so. (R 8-26-85, p 22). Twice Cremeans indicated to the panel that he had serious doubts about his ability to perform the job of a police officer, and that he could jeopardize his own safety, or that of a citizen or fellow officer. (R 8-26-85, pp 21-22, 28-29). Cremeans was given a non-duty disability retirement. (R 8-26-85, p 32). The retirement board's vote was unanimous. The individual members testified that they considered not only the Wilson

report and the O'Connor letter, but the testimony of Jack Cremeans himself.

At the hearing, Cremeans was advised that he could petition the retirement board for reinstatement, if he could demonstrate that he had regained his ability to do his job. (R 8-26-85, p 31). Cremeans never applied for reinstatement. (R 8-19-85, p 163). Indeed, no doctor ever presented to Cremeans any written evidence that he could go back to work as a police officer. (R 8-19-85, pp 164-165).

Before this case went to the jury, Petitioner's claims had been reduced to these:

(1) Civil rights violations as to Asman, Van Damme, Spybrook and Haggerty, and

(2) Intentional infliction of mental distress as to Asman and the City of Roseville.

Petitioner's allegations of intentional infliction of mental distress against Spybrook and Haggerty were dismissed by the Court. The jury no-caused these allegations as to Asman and Van Damme. Petitioner dropped his constructive discharge allegation. Petitioner's civil rights allegations against the City of Roseville were dismissed. The Roseville Retirement Board and Police Department were adjudged part of the City, so the claims against these parties also fell by the wayside.

None of the evidence discussed above was controverted, save for the issue of Asman's animosity. Yet, in the face of this evidence, a jury found that Asman and Van Damme had violated Cremeans' right to procedural due process, and awarded Cremeans a substantial sum in compensatory and punitive damages. Respondents had moved unsuccessfully for a directed

verdict, arguing, *inter alia*, that the evidence was legally insufficient to submit the due process issue to a jury. Respondents then moved for a judgment notwithstanding the verdict, or, in the alternative, a new trial.

The trial court denied the Respondents' post-trial motions, and they took an appeal from the adverse judgment. Petitioner cross-appealed, principally because of the trial court's denial of his equitable claim for reinstatement. The Sixth Circuit Court of Appeals reversed the judgment of the trial court, finding that Respondents were entitled to summary disposition on the issue of violation of procedural due process. The Court of Appeals also denied Petitioner's cross-appeal. Petitioner's Motion for Rehearing was denied. Other facts of record relevant to the issues raised in Petitioner's Petition for Writ of Certiorari will be addressed in the argument portion of this response to the Petition.

PETITIONER'S REASONS FOR GRANTING THE PETITION

The question of what process is due a public employee entitled to 14th Amendment due process guarantees is hardly one of first impression, as Petitioner arcanely characterizes it. In fact, this Court has been active in defining the limits of procedural due process during the last half century. *See notably, Mullane* v *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313; 70 S. Ct. 652; 94 L. Ed. 865 (1950); *Mathews* v *Eldridge*, 424 U.S. 319; 96 S. Ct. 893; 47 L. Ed. 2d 18 (1976).

More particular guidance on this issue was recently supplied in *Cleveland Board of Education* v *Loudermill*, 470 U.S. 532; 105 S. Ct. 1487; 84 L. Ed. 2d 494 (1985), which described the type of abbreviated pre-action hearing appropriate to cases involving termination of employment. Although this case, in contrast, involves the lesser private interest of medical retirement, the *Louder-*

mill decision provides lower courts with all the authority and guidance they need to analyze due process claims of the type advanced by Petitioner.

Further, the Sixth Circuit has issued opinions which provide guidance in this area. *See Lee* v *Western Reserve Psychiatric Habilitation Center*, 747 F 2d 1062 (CA 6, 1984); *Duchesne* v *Williams*, 849 F 2d 1004 (CA 6, 1988). The Court relied most conspicuously upon *Loudermill* and *Duchesne* in deciding the instant case. *Cremeans* v *City of Roseville*, 861 F 2d 878 (CA 6, 1988). Petitioner describes *Duchesne* as "a flawed opinion" and notes that it is the subject of a Petition for Certiorari. However, the Clerk of this Court has informed Respondents that this Petition was denied by Order dated March 20, 1989.

The decision of the Court of Appeals in the instant case is not in conflict with any "sham hearing" case of this Court or another Circuit Court. Petitioner's problem was that the facts of record are grossly insufficient to make out a jury-submissible case of due process violation, under a "sham hearing" theory or otherwise.

REASONS FOR DENYING THE WRIT

I.

AS A MATTER OF LAW PLAINTIFF FAILED TO PRESENT SUFFICIENT EVIDENCE TO CREATE A JURY QUESTION THAT HIS RIGHT TO PROCEDURAL DUE PROCESS WAS VIOLATED, BY MEANS OF A "SHAM HEARING" OR OTHERWISE.

The issue in this case was whether Petitioner's due process rights were violated when he was given a non-

duty disability retirement by the Roseville Retirement Board. The factual references by Petitioner on appeal are grossly incomplete, argumentative and misleading, and on occasion incapable of support on the record. Upon thorough examination of the entire record, the 6th Circuit Court of Appeals was easily able to conclude that Petitioner had no due process claim as a matter of law.

Petitioner agrees that the essence of due process is notice and the opportunity to be heard. Petitioner had notice, not just twenty-six (26) hours' notice of the actual retirement board hearing, but notice two (2) months prior to the hearing that retirement proceedings had been set in motion. Petitioner also had the opportunity to speak at his retirement proceedings, and also had a union representative present to speak for him. Among other things, Petitioner said this: "I'll be very honest with you. The knee is bad. From what the doctors' opinions I have talked and I have seen four to five specialists. It's not going to get any better even with my therapy program I am involved in and there is doubts as to my main concern as I really honestly feel like I might jeopardize my own being more so, or I might be out there and jeopardize another officer or a citizen." (App. 13).

The Board also had before it the medical report of Dr. Wilson, the retirement boards' medical director, which indicated, "In view of the presence of these problems and the possible circumstances I have noted, I would have serious doubts as to Mr. Cremeans' physical ability to continue to perform as a patrolman." (R 8-26-

85, p 16). The retirement board also considered the letter from Dr. O'Connor which Cremeans himself had given to Chief Asman, which letter indicated that Mr. Cremeans should change occupations. (R 8-26-85, p 20).

Thus one of the more serious problems with the Petitioner's case was the fact that the sole purpose of the retirement hearing was to determine whether or not Petitioner could continue to work as a police officer, and all of the medical evidence corroborated by Petitioner's own statements at the hearing, indicated that he could not.

The abject weakness of Petitioner's position was reflected in the manner in which his case was prosecuted. Petitioner attempted to exclude all medical reports and evaluations on the grounds that their conclusions were not authored in the precise terms used in the City charter's involuntary retirement provision. The trial court properly rebuffed this effort. During cross-examination of Van Damme, Petitioner's attorney attempted to get the witness to admit that he should not have considered Cremeans' own statements at the retirement hearing, for the reason that Cremeans was not qualified to render an opinion as to his medical condition. (R 8-26-85, pp 37-41). The irony of this trial posture is self-evident, given that the gravamen of Petitioner's civil rights complaint was that he was not afforded an opportunity to be heard.

There can be little doubt that Petitioner had sufficient notice and an opportunity to be heard under the circumstances of this case, a point which will be addressed in detail later in this brief. Here, Respondents will examine Petitioner's argument that the retirement hearing was a sham, an argument which Petitioner did not press with any significant amount of force until the appellate stage of this litigation.

Before the Circuit Court, and in this Court, Petitioner paints a picture of a hateful Chief Asman ramming through a retirement while the rest of the retirement board did not understand the situation and, impliedly, were incapable of making a proper evaluation. This scenario is in sharp contrast to the record.

Petitioner introduced at trial evidence purporting to show that Police Chief Thomas Asman bore a grudge against Petitioner, due to certain events which had transpired in the past. (R 8-19-85, pp 56-84). This testimony was controverted by that of Asman. (R 8-26-85, pp 139-158). But absent from the record was any evidence that this alleged "ill-will" colored Asman's conduct as a member of the Roseville Retirement Board. All the testimony demonstrates is that Asman initiated the retirement process, as any retirement board member is empowered to do under the charter. Under Petitioner's analysis, any board member who invoked the charter provision and initiated a medical retirement should be disqualified from participation at the hearing because of bias. However, this runs contrary to the holding of the court in *Duchesne* v *Williams*, 849 F 2d 1004 (CA 6, 1988). Further, the record fully supports Asman's actions in seeking a retirement hearing.

Again, Petitioner suffered a debilitating knee injury for which he filed a lawsuit alleging reduced wage-earning capacity. Although Petitioner missed several months of work, Asman took no action to seek his retirement at that time. On September 10, 1980, however, Petitioner underwent knee surgery, and was absent from work for several more weeks. At that time, Asman, as Chief of Police, was compelled to request that Cremeans produce a letter from a physician indicating he was capable of returning to work. (R 8-26-85 p 121). Cremeans did indeed produce a letter from a physician, but the

letter informed Cremeans that he should change jobs. It was at that time, during early November of 1980, that Asman explained to Cremeans that a medical evaluation and subsequent retirement hearing might be held. Cremeans saw Dr. Wilson, the Board's medical examiner, during December of 1980. When Asman got Wilson's report, he now had strong indications from two physicians that Cremeans was not capable of performing as a police officer. Asman then acted with dispatch to set up a retirement hearing.

Plaintiff's knee injury was *real*, and Plaintiff's theory that it was only the pretext Asman had been waiting for to get rid of Cremeans is pure folly.

Even assuming that Asman harbored dark motives, and that these motives affected his participation in Petitioner's retirement, Petitioner still fell far short of establishing a prima facie case that the hearing was a sham. Asman was but one member of a five member retirement board, four members of which sat during the hearing at which Petitioner was retired. The remaining board members were Van Damme, Spybrook and Haggerty. The unsupported assertions of Petitioner on appeal that Van Damme may have entered into a conspiracy with Asman to retire Petitioner must be ignored. There is not a shred of evidence in the record that Van Damme harbored any personal or professional animosity towards Petitioner. Indeed, it was Van Damme who, at the retirement hearing, informed Petitioner that he had the right to come back before the retirement board at any time to ask for reinstatement, upon demonstrating that he was capable of working as a police officer. With regard to Haggerty and Spybrook, Petitioner suggests only that they were confused and might have been under the assumption that Petitioner himself brought the matter before the board. None of this is true. At the

time of the retirement hearing both Cremeans and his representative, William Powell, clearly informed the retirement board that Cremeans had not requested the disability retirement. (R 8-26-85, pp 20, 25-26). Thus, none of the board members were under any misimpression that Petitioner had requested the retirement prior to the vote being taken. The deposition testimony of Haggerty and Spybrook was read into the trial record. Both witnesses indicated that they did not know who had requested the retirement, and Haggerty indicated that it would not have made any difference who made the request. The testimony of both witnesses indicates that they were keenly aware of the issue before the board.

Thus, giving Petitioner the benefit of the doubt on any testimonial dispute, Petitioner could still not demonstrate a sham hearing. Petitioner could produce evidence from which it might be inferred that Asman was biased against him, but Asman was only one member of the board, and three votes were required for retirement. The vote, in fact, was unanimous. Compare *Chicago Cable Communications* v *Chicago Cable Commission*, 678 F Supp 734 (ND Ill, 1988), where possible bias on the part of the chairperson could constitute no due process violation where the remaining commissioners all seemed conscientious and fair.

Petitioner further maintains that the board did not follow City charter requirements governing the award of a disability retirement, a contention which is both inaccurate and irrelevant. It is irrelevant, because governmental procedures prior to adverse action do not define what process is due under the Federal Constitution. *Cleveland Board of Education* v *Loudermill*, 470 U.S. 532; 105 S. Ct. 1487; 84 L. Ed. 2d 494 (1985). It is

inaccurate, because the record indicates that the charter provisions were indeed followed.

There is no dispute that Cremeans' retirement was initiated by his department head, Chief Asman. Further, the medical director did produce a report to the retirement board indicating that Cremeans could no longer function as a police officer. Plaintiff's argument that the charter was violated is based principally on the fact that Wilson's report does not use the *exact language* employed in the charter provision. (R 8-20-85, p 34). However, based upon interpretations of the charter provision made by the City attorney, Van Damme concluded that the medical report was sufficient to meet the charter requirements. (R 8-20-85, pp 24-25, 27-28, 140).

In this case, the Court of Appeals found an absence of proof that the proceeding was a sham, and found in fact that the proceeding met all of the due process requirements for a pre-termination hearing set forth in *Loudermill* and *Duchesne*.

In the remainder of this argument, Petitioner maintains that the Court of Appeals erred in finding that Petitioner had state law remedies which he did not pursue. However, as the quotation from the Court of Appeals' opinion set forth below illustrates, this question was not determinative of the outcome of the appeal:

> "The theory upon which Cremeans' § 1983 Complaint was submitted to the jury was that the individual board members deprived him of his constitutional right to due process. We are not concerned with determining whether the procedure involved strictly complied with state law. There was a state law remedy for such a

> violation which Cremeans chose to forego. A state is allowed to provide more elaborate protection of employees' rights that is provided by the federal law and the Constitution. What we are concerned with here is the question of whether Cremeans received constitutionally adequate process when he was placed on involuntary nonduty medical disability retirement." *Cremeans, supra*, p 882.

At any rate, Petitioner's argument, that no post-deprivation remedy existed is incorrect. It is unclear whether the Court of Appeals determined that MCL 38.514, providing for direct appeal to the Circuit Court, applied in this case. If it did, then Petitioner must assume some of the blame, because Petitioner's Complaint relied upon MCL 38.501-38.518 for the contention that Petitioner had a property right in continued employment. Petitioner made no effort prior to his Motion for Rehearing in the Court of Appeals to assert his belief that not all of these provisions, of which MCL 38.514 was a part, applied. Moreover, both parties agree that MCL 38.555, providing that the retirement board shall be a quasi-judicial body whose actions shall be reviewable by Writ of Certiorari (now superintending control), applies to this case. Despite Petitioner's remonstrations to the contrary, this tool for review of retirement board decisions has vitality. *See, e.g., O'Connell* v *Dearborn Pension Board*, 334 Mich 208 (1952), where a grant of mandamus relief was affirmed. Even if Petitioner's ability to review the board hearing were limited to questions of law, as Petitioner maintains it would be, Petitioner's contention that the board violated the charter provisions relating to involuntary retirement would be such a question of law.

More fundamentally, this is not the type of case where the absence of elaborate post-action review proceedings would render abbreviated, *Loudermill*-style pre-action proceedings inappropriate. Unlike cases involving termination of employment, this case involved involuntary medical retirement. The former is necessarily permanent, and the latter is not. *See* MCL 38.556(f) providing for periodic medical examination of retired employees. This section provides that the board shall, on a retired member's application, have him undergo a physical examination. If the physician reports to the board that the member is physicially able to resume employment, he shall, under this section, be restored to active service. Note that during the course of the retirement hearing, Van Damme explained to Petitioner that he had a right at any time to come back to the board and seek reinstatement, upon demonstrating that his knees were in such a condition that would allow him to perform the duties of a police officer.

II.

THE DECISION IN THE INSTANT CASE IS NOT IN CONFLICT WITH A DECISION OF THE 7TH CIRCUIT COURT OF APPEALS, NOR WOULD IT MATTER IF IT WERE.

Petitioner implies that the Court of Appeals' decision is in conflict with *Ciechon* v *City of Chicago*, 686 F 2d 511 (CA 7, 1982), though Petitioner never reveals the exact nature of this conflict. Further, Petitioner does not explain why this relevation, if considered acceptable, would warrant grant of a Petition for Certiorari by this Court.

An examination of the *Ciechon* decision does not yield a foundation for the conclusion that there is any legal conflict between *Ciechon* and this case, and the facts of the two cases are erratically different. *Ciechon*

is a real horror story. There, the Plaintiff was a paramedic with the Chicago Fire Department. She was discharged by the City following an incident in which a patient died shortly after being visited by her ambulance crew. The patient's family complained bitterly to City officials and the media concerning the ambulance crew's performance.

In determining that the Plaintiff had been unfairly given the bum's rush by the City, the Court of Appeals found that the City had panicked under pressure from the media and a vengence-seeking family, leading to a decision to discharge Plaintiff in order to defuse the situation.

It is quite clear that the *Ciechon* Court believed Plaintiff was responsible for no malfeasance that would have warranted discharge. *Ciechon* also found it intolerable that Plaintiff was singled out for discharge, when she bore no more responsibility for what happened than did anyone else on the ambulance crew.

Ciechon finds no analogy here. The Roseville Retirement Board met to consider the question of whether Petitioner was capable of functioning as a police officer in the wake of his slip and fall injury and subsequent operation. All the available evidence, including Petitioner's own statements at the hearing, indicated that he was not. Compare *Ciechon*, in which the record did not justify the action taken against Plaintiff. Unlike *Ciechon*, the board that retired Petitioner in this case was not permeated with bias or improper motive. Again, Petitioner had some evidence that only one member of the board, Chief Asman, may have disliked him. Yet, three votes were required to retire Petitioner, and there was no evidence of bias or improper motive on the part of the remaining sitting members.

Other cases cited by Petitioner in this section are likewise easily distinguished. In *Bhargave* v *Cloer*, 355 F Supp 1143 (ND Ga, 1972), Plaintiff, a probationary teacher, was dismissed in the middle of her contract. Yet the board of education had already met and decided to terminate the Plaintiff's contract before the hearing requested by the Plaintiff was held. The court found that the hearing was not meaningful, since the harm which the hearing was designed to prevent had already occurred. Thus, the court in *Bhargave* did not even reach the issue of the Plaintiff's entitlement to an impartial tribunal. In the instant case, Haggerty and Spybrook testified that the members of the board did not even discuss Cremeans' retirement prior to the hearing.

Petitioner also cites *Salisbury* v *Housing Authority of Newport*, 615 F Supp 1433 (DC Ky, 1985). There the court held that the Plaintiff was deprived of her due process right to an impartial decision maker when she was terminated as director of the Newport Housing Authority. In that case, however, there was apparently a bitter personal dispute between the Plaintiff and all of the housing authority members. Additionally, the members had pecuniary and personal interests in seeing the termination upheld, because of pending and possible future litigation. *Salisbury* is thus also far afield from the facts of this case.

Petitioner's "sham proceedings" argument is nothing more than a desperate attempt to avoid the abundant authorities holding that the procedures employed by the board in this case were quite sufficient to ensure procedural due process. Petitioner had notice of the hearing and an opportunity to be heard. What Petitioner said when he was heard, combined with the medical evidence, virtually guaranteed his retirement without regard to who was sitting on the board.

III.

THE DECISION IN THE INSTANT CASE IS NOT IN CONFLICT WITH ANY DECISION OF THE UNITED STATES SUPREME COURT.

Answering this issue is difficult, because Petitioner never explains the nature of the conflict which allegedly exists between the lower court opinion in this case and any particular decision of the Supreme Court. Contrary to Petitioner's assertion, the Court of Appeals did indeed recognize that the question of what process is due depends upon the balancing of competing interests, in deference to this Court's opinion in *Cleveland Board of Education* v *Loudermill*, 470 U.S. 532; 105 S. Ct. 1487; 84 L. Ed. 2d 494 (1985). The court below clearly found that Petitioner had been afforded an adequate pretermination hearing when measured against *Loudermill*'s benchmark. There was no need for the Court of Appeals to engage in an elaborate discussion of each factor to be included in the balance, because this was simply not a close case. A more detailed analysis of the competing factors only serves to strengthen the result reached by the Court of Appeals.

Procedural due process mandates that an individual be given "notice and opportunity for hearing appropriate to the nature of the case". *Mullane* v *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313; 70 S. Ct. 652; 94 L. Ed. 865 (1950). The notice must be "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . and it must afford a reasonable time for those interested to make their appearance . . . [I]f . . . those conditions are reasonably met, the constitutional requirements are satisfied." *Mullane, supra,* pp 314-315.

As the *Mullane* decision suggests, procedural due process is a flexible concept which depends upon a balancing of competing interests. The elements to be considered were set forth in *Mathews* v *Eldridge*, 424 U.S. 319; 96 S. Ct. 893, 903; 47 L. Ed. 2d 18 (1976):

> "Our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Logically, if the first two factors are of substantial weight, but the third is not, the full panoply of due process protections would be implicated. However, where a strong showing is not made on the first two factors, but is as to the third, a hearing prior to adverse administrative action could be substantially abbreviated. In this case, the balance of factors is such that Plaintiff was afforded more procedural protection than due process would require.

Defendants will first examine the strength of the private interest involved. Describing the private interest of the litigant in cases involving *termination* of employment, the Supreme Court has said:

> "First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood . . .

> While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job." *Cleveland Board of Education* v *Loudermill*, 470 U.S. 532; 105 S. Ct. 1487; 84 L. Ed. 2d 494 (1985).

In contrast, this case involves not a termination of employment but rather an involuntary medical retirement. The difference in these two situations is analogous to the distinction between the interests of a welfare recipient and those of a recipient of social security disability benefits. In *Goldberg* v *Kelley*, 397 U.S. 254; 90 S. Ct. 1011; 25 L. Ed. 2d 287 (1970), the high Court held that an evidentiary pre-termination hearing was required prior to temporary deprivation of welfare benefits. In doing so, the Court emphasized the strength of the private interest involved: "[T]ermination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." 90 S. Ct. at 1018. But six years later in *Mathews*, the Court declined to extend this protection to persons facing discontinuation of disability benefits under the Social Security Act.

The distinction drawn by the *Mathews* Court is analytically helpful. *Mathews* observed that although the hardship on a disabled worker deprived of benefits could be significant, the worker's need was likely to be less than that of a welfare recipient. The Court rendered this explanation: "In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family below the subsistence level." 96 S. Ct. at 905 (Citation

and Footnote omitted). The *Mathews* Court then stated:

> "In view of these potential sources of temporary income, there is less reason here than in *Goldberg* to depart from the ordinary principal [*sic*], established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action." 96 S. Ct. at 906.

In our case, Petitioner's medical retirement entitled him to non-duty disability retirement benefits. Further, the injury which caused Petitioner to be retired made him eligible for worker's compensation benefits. The fired employee gets none of this. Also, the prospect of other employment is not so drastically affected by a medical retirement as it would be by termination. The retirement would certainly reduce Petitioner's chances of obtaining employment elsewhere as a police officer, but would not affect his ability to obtain less strenuous employment, as a termination would. Also, since Petitioner could have petitioned for reinstatement at any time, the duration of his severance was not permanent, provided he could show he was capable of working. Unambiguously, the private interest of an employee facing involuntary medical retirement is not coextensive with that of an employee threatened with termination.

The second factor focuses on the risk of erroneous deprivation from the procedures used and the probable value of additional safeguards. This factor is of no assistance to Petitioner in the balance for several reasons. Initially, the pivotal inquiry in a medical retirement is whether the employee is physically capable of doing his or her job. This determination is predicated to a greater extent on objective factors than is the determination of

whether an employee should be fired for cause. This being the case, the argument for more stringent due process protections is attenuated. For support Defendants return to *Mathews*, where a determination of medical disability was also at issue. The decision to discontinue disability benefits, the *Mathews* Court observed, would normally turn upon "routine, standard, and unbiased reports by physician specialists" concerning a subject which they have personally examined. 96 S. Ct. at 906, quoting *Richardson* v *Perales*, 402 U.S. 389; 91 S. Ct. 1420, 1428; 28 L. Ed. 2d 842 (1971). For this reason witness credibility and veracity are not typically a problem, so the "potential value of an evidentiary hearing, or even oral presentation to the decision maker, is substantially less in this context than in *Goldberg*. *Mathews, supra*.

The fact that an evidentiary hearing with a right of cross-examination and representation by counsel was not required in disability retirement cases was recognized even prior to the *Mathews* decision. *Siletti* v *New York City Employees' Retirement System*, 401 F Supp 162 (SD NY, 1975), *aff'd without op*, 556 F 2d 559 (CA 2, 1977). Compare *Madera* v *Board of Education of City of New York*, 386 F 2d 778, 785 (CA 2, 1967), *cert den*, 390 U.S. 1028; 88 S. Ct. 1416; 20 L. Ed. 2d 284 (1968).

In *Kabelka* v *City of New York*, 353 F Supp 7 (SD NY, 1973), a municipal fireman challenged the procedures by which he was awarded a non-duty disability retirement, claiming that he should have been allowed representation of counsel and the opportunity to cross-examine medical witnesses. The court rejected both claims. More specifically, the court determined that counsel would not have been of any value to plaintiff in a meeting, the function of which was to review medical

findings and determine plaintiff's disability status. *Kabelka, supra,* p 9.

In *Siletti, supra,* the court more closely analyzed the issue of confrontation of witnesses in the disability retirement context. There the plaintiff had relied upon *Goldberg* v *Kelley,* 397 U.S. 254; 90 S. Ct. 1011; 25 L. Ed. 2d 287 (1970), the welfare termination proceedings case, in which the court stated that on most occasions where factual questions are presented, "due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg, supra,* 397 U.S. at 269. The *Siletti* Court found this principle to be without application in the disability retirement context:

> "In the case at hand, by contrast, the questions of credibility and lack of veracity by medical witnesses are not likely to arise. Indeed, although the plaintiff disputes the medical and factual conclusions reached by the defendant, he has not challenged the medical fact finder's credibility or fairness. In the absence of questions of credibility, other than the usual conflicting opinions of opposing medical experts, the plaintiff's interest in cross-examination is minimal." *Siletti, supra,* p 167.

In this particular case, any risk of error in the proceedings was reduced to insignificance for another very fundamental reason — plaintiff admitted that he had serious doubts about his ability to perform as a police officer. At the January 7, 1981 retirement hearing, Jack Cremeans told the board:

> "I'll be very honest with you. The knee is bad. From what the doctor's opinions I've talked and I've seen four to five specialists. It's not gonna get any better even with my therapy program I'm

> involved in and there's doubts as to my main concern is I really honestly feel like I might jeopardize my own physical being more so or I might be out there and jeopardize another officer or a citizen."

In two Federal District Court cases, the Plaintiff made admissions which similarly went to the heart of the subject matter of the administrative action, prior to that action. *Hayes* v *City of Wilmington*, 451 F Supp 696 (D Del, 1978); *Behan* v *City of Dover*, 419 F Supp 562 (D Del, 1976). In both cases it was held that abbreviated procedures did not create a significant risk of error in light of those admissions.

In this case, Petitioner's own statement corroborated the medical conclusions of Dr. Wilson, the retirement board's medical examiner. Dr. Wilson's report concluded that "in view of the presence of these problems and the possible circumstances I have noted, I would have serious doubts as to Mr. Cremeans' physical ability to continue to perform as a patrolman." One wonders, therefore, how enhanced due process protection would have decreased the risk of an erroneous deprivation in this case.

The final factor to be examined in determining the due process balance is the public interest, and the Supreme Court has held that the governmental interest in being able to act expeditiously to remove an unsatisfactory employee is substantial. *Arnett* v *Kennedy*, 416 U.S. 134; 94 S. Ct. 1633, 1651; 40 L. Ed. 2d 15 (1974). Not surprisingly, this interest is particularly acute where the employer is charged with protection of the public safety. In *Hayes*, where the governmental employer was a fire department, the employee was suspended for, among other things, showing up over five hours late to work. The *Hayes* Court expressed the

strength of the public interest involved in the following language:

> "On the other side of the scale, Defendant Bureau of Fire is charged with the responsibility of protecting the lives and property of the citizens of the City of Wilmington. To discharge its duty effectively, the bureau of fire must be able to depend on its fire fighters being at their duty stations at the assigned times or, at the very least, notifying their superiors when they cannot report. Thus, Defendants' interest is a weighty one disserved by a requirement of elaborate pre-suspension procedures or the payment of wages to misbehaving employees." *Hayes, supra,* pp 709-710 (Footnote omitted).

Similarly, a municipal police department has an obligation to protect public property and safety, and therefore, has a strong interest in being able to ensure that police officers no longer capable of performing their jobs for physical reasons can be retired without an elaborate retirement proceeding.

In review, Respondents would afford moderate weight to the first factor involving Petitioner's private interest, virtually no weight at all to the second factor involving risk of erroneous deprivation and the possibility that enhanced due process protections would reduce that risk, and great weight to the third factor, public interest. Given this balance, if due process required a pre-action oral confrontation or an opportunity to be heard at all, it would require at best an abbreviated hearing at which the Petitioner was afforded an opportunity to give his side of the story.

Petitioner had notice of the hearing at which he was retired, sufficient to ensure his presence. Board member

Haggerty offered him the opportunity to have the matter tabled, which should eliminate any concern about the extent of prior notice. Petitioner had the opportunity to be heard and he was heard. Where the government interest is so strong, and the private interest is at considerably less than full strength, the hearing provided in this case was all that due process required. Compare *Lee* v *Western Reserve Psychiatric Habilitation Center*, 747 F 2d 1062 (CA 6, 1984). In that case, the Plaintiff was *discharged* at an abbreviated hearing held on 24 hours' notice, where the Plaintiff was not given the opportunity to call and cross-examine witnesses, or to be represented by counsel.

Interestingly, Petitioner does not even suggest what additional protection should have been given Petitioner at the retirement hearing, or how such additional protections could have made a difference in the result of the hearing. In fact, where the medical evidence together with Petitioner's own admissions so strongly warrants medical retirement, one is given to wonder what additional protections could have made any difference in the outcome.

IV.

THE COURT OF APPEALS WAS CLEARLY CORRECT IN DETERMINING THAT RESPONDENTS WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Respondents have already set forth the evidence presented by Petitioner, and demonstrated how that evidence was manifestly insufficient to make out a prima facie case for a violation of due process. This analysis need not be repeated here.

This was a case that never should have been filed in the first place. The real tragedy of this matter is that

despite diligent and repeated efforts by Respondents to have this case thrown out of court, the trial court permitted it to go to a jury. This was an error of law.

The determination of whether a directed verdict should have been granted is one that requires the reviewing court to sift through the trial record and determine whether Petitioner had a prima facie case. It is not, according to Respondent's understanding, the station of this Court to perform such a task. At any rate, the issue was thoroughly briefed and argued in the Court of Appeals, and the record should reflect that that court put a considerable amount of time and effort into the task. That court's determination should stand undisturbed.

RELIEF REQUESTED

WHEREFORE, Respondents pray that this Honorable Court deny the Petition for Certiorari.

Respectfully submitted,

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